

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF DELAWARE

3
4 SYNOPSIS, INC. and CADENCE)
DESIGN SYSTEMS, INC.,)

5)
6 Plaintiffs,)

7 v.)

8 BELL SEMICONDUCTOR, LLC,)

9 Defendant.)

10 - - - - -)
SIEMENS INDUSTRY SOFTWARE INC.,)

11 Plaintiff,)

12 v.)

13 BELL SEMICONDUCTOR, LLC,)

14 Defendant.)

J. Caleb Boggs Courthouse
844 North King Street
Wilmington, Delaware

Thursday, April 27, 2023
9:02 a.m.
Oral Argument

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17
18
19 BEFORE: THE HONORABLE COLM F. CONNOLLY, U.S.D.C.J.

20 APPEARANCES:

21 YOUNG CONAWAY STARGATT & TAYLOR, LLP
22 BY: PILAR G. KRAMAN, ESQUIRE
BY: ROBERT M. VRANA, ESQUIRE

23 -and-
24
25

1 APPEARANCES CONTINUED:

2 ARNOLD & PORTER

3 BY: MATTHEW M. WOLF, ESQUIRE

4 BY: JEFFREY A. MILLER, ESQUIRE

5 BY: KURT RIESTER, ESQUIRE

6 -and-

7 WILKIE FARR & GALLAGHER LLP

8 BY: KRISTA SCHWARTZ, ESQUIRE

9 BY: BARRINGTON DYER, ESQUIRE

10 -and-

11 VENABLE LLP

12 BY: FRANK C. CIMINO, JR., ESQUIRE

13 BY: MEGAN S. WOODWORTH, ESQUIRE

14 For the Siemens Plaintiff

15 FARNAN LLP

16 BY: BRIAN E. FARNAN, ESQUIRE

17 -and-

18 McKOOL SMITH

19 BY: RICHARD A. KAMPRATH, ESQUIRE

20 BY: JOSHUA J. NEWCOMER, ESQUIRE

21 BY: KYLE RYMAN, ESQUIRE

22 BY: LAUREN SIMENAUER, ESQUIRE

23 BY: HANNAH MIRZOEFF, ESQUIRE

24 For the Defendant

25 U.S. ATTORNEY'S OFFICE

BY: DYLAN J. STEINBERG, ESQUIRE

-and-

U.S. INTERNATIONAL TRADE COMMISSION

BY: SIDNEY ROSENZWEIG, ESQUIRE

For the U.S. International Trade Commission

08:36:52 1 *** PROCEEDINGS ***

08:58:56 2

08:59:09 3 DEPUTY CLERK: All rise. Now, in the United
09:02:22 4 States District Court for the District of Delaware, the
09:02:25 5 Honorable Colm F. Connolly presiding.

09:02:28 6 THE COURT: All right. Good morning. Please be
09:02:33 7 seated.

09:02:34 8 Yes, Ms. Kraman. Ms. Kraman.

09:02:43 9 MS. KRAMAN: Good morning, Your Honor.

09:02:46 10 THE COURT: Good morning.

09:02:47 11 MS. KRAMAN: Pilar Kraman of Young Conaway for
09:02:50 12 Plaintiffs. And with me from Young Conaway is Rob Vrana,
09:02:54 13 and next to Rob is Megan Woodworth from Venable --

09:02:57 14 MS. WOODWORTH: Good morning.

09:02:58 15 MS. KRAMAN: -- for Siemens.

09:03:00 16 And then Jeff Miller from Arnold & Porter for
09:03:04 17 Cadence.

09:03:04 18 MR. MILLER: Good morning, Your Honor.

09:03:04 19 MS. KRAMAN: And then at counsel table, Matt
09:03:06 20 Wolf --

09:03:06 21 MR. WOLF: Good morning, Your Honor.

09:03:07 22 MS. KRAMAN: -- from Arnold & Porter for
09:03:08 23 Cadence. Isaac -- oh, sorry. Krista Schwartz --

09:03:14 24 MS. SCHWARTZ: Good morning, Your Honor.

09:03:15 25 MS. KRAMAN: -- from Wilkie Farr for Synopsys.

09:03:15 1 Frank Cimino --

09:03:15 2 MR. CIMINO: Good morning, Your Honor.

09:03:15 3 MS. KRAMAN: -- for Siemens from Venable.

09:03:19 4 Kurt Riester from Arnold & Porter for Cadence.

09:03:19 5 MR. RIESTER: Good morning, Your Honor.

09:03:23 6 MS. KRAMAN: And then in the gallery is Justin

09:03:27 7 Boyce from Synopsys and Isaac Lin from Cadence.

09:03:30 8 MR. LIN: Good morning, Your Honor.

09:03:31 9 THE COURT: All right. Thank you.

09:03:33 10 So, you covered all the Plaintiffs?

09:03:34 11 MS. KRAMAN: Yes.

09:03:35 12 THE COURT: All right. Good. Thank you.

09:03:37 13 Mr. Farnan.

09:03:39 14 MR. FARNAN: Good morning, Your Honor.

09:03:42 15 THE COURT: Good morning.

09:03:43 16 MR. FARNAN: Brian Farnan on behalf of Bell

09:03:46 17 Semiconductor, and with me today is Richard Kamprath, Lauren

09:03:46 18 Simenauer.

09:03:46 19 MR. KAMPRATH: Good morning, Your Honor.

09:03:46 20 MS. SIMENAUER: Good morning, Your Honor.

09:03:50 21 MR. FARNAN: Josh Newcomer.

09:03:52 22 MR. NEWCOMER: Good morning, Your Honor.

09:03:53 23 MR. FARNAN: Hannah Mirzoeff.

24 MS. MIRZOEFF: Good morning, Your Honor.

25 MR. FARNAN: We have Kyle Ryman --

1 MR. RYMAN: Good morning, Your Honor.

2 MR. FARNAN: -- all from McKool Smith. And on
3 behalf of the client, we have Josh --

4 MR. VESCHI: Good morning, your Honor.

5 MR. FARNAN: John, I'm sorry. John. All right.

09:04:08 6 THE COURT: And then I have -- it's Bell; right?

09:04:12 7 So, I've got Siemens -- no, no. Sorry. I've
09:04:15 8 got everybody then.

09:04:16 9 All right. I'm mixed up here. I've got --
09:04:19 10 Mr. Steinberg, welcome.

09:04:23 11 MR. STEINBERG: Good morning, Your Honor. Dylan
09:04:25 12 Steinberg on behalf of the United States International Trade
09:04:28 13 Commission. With me from the Commission is Sidney
09:04:32 14 Rosenzweig, the Commission's Acting Assistant General
09:04:34 15 Counsel.

09:04:39 16 THE COURT: Okay. All right. Thank you.

09:04:41 17 Mr. Rosenzweig, let me start with you.

09:04:53 18 MR. ROSENZWEIG: Good morning, Your Honor.

09:04:54 19 THE COURT: Good morning. Has the ITC ever
09:04:57 20 written a brief like that before?

09:04:58 21 MR. ROSENZWEIG: It's been a long time. The
09:05:00 22 Commission was involved in the *Tessera* case that went in
09:05:05 23 front of the Federal Circuit some time ago which resolved
09:05:08 24 the issue of contractual disputes giving rise to enjoining
09:05:14 25 parties to Commission proceedings. And it could be that the

09:05:17 1 Commission participated back in *Convertible Rowing* and some
09:05:21 2 of these other very -- from my perspective, cases that
09:05:24 3 preceded my time with the Commission over the last 14 years.
09:05:27 4 This is our first time intervening in one of these cases in
09:05:32 5 a while.

09:05:34 6 In *Philips vs. Thales*, which was in front of --

09:05:36 7 THE COURT: Yeah, I didn't see it in that case,
09:05:39 8 so I was wondering what prompted this.

09:05:41 9 MR. ROSENZWEIG: Well, we need to be notified
09:05:43 10 about these proceedings. So, in this case, we just got a
09:05:45 11 status report from Bell that said, "Hey, Commission, you
09:05:47 12 might be interested in this." And we were.

09:05:50 13 And if we had received that type of notification
09:05:53 14 from one of the parties in *Philips vs. Thales* or it turns
09:05:57 15 out that there are a number of these cases over the last
09:05:59 16 five years that have been -- that were string cited in our
09:06:02 17 brief, *Kershaw*, *Hoist*, and some of these others, I think we
09:06:06 18 would have participated in those as well or tried to, if we
09:06:09 19 could.

09:06:13 20 THE COURT: What's the interest of the ITC?

09:06:15 21 MR. ROSENZWEIG: Well, the interest of the ITC
09:06:18 22 is in making sure that the Commission's proceedings can go
09:06:20 23 forward in the manner contemplated by Congress and in the
09:06:24 24 manner required by our statute in which Commission
09:06:26 25 proceedings are to conclude at the earliest practical time

09:06:31 1 and in which Congress has recognized that the Commission
09:06:36 2 adjudicates trade disputes that can occur simultaneously
09:06:40 3 with District Court proceedings. And often when that's
09:06:43 4 done, in accordance with Section 1659 of Title 28, the
09:06:50 5 Commission proceedings are ordinarily required to go first.
09:06:54 6 So, the Commission's interest is in making sure that that
09:06:59 7 regime is respected.

09:07:00 8 I think the Commission's interest is also in
09:07:02 9 making sure that if a Court has concerns about something
09:07:07 10 that the Commission is doing -- here it doesn't seem -- that
09:07:10 11 doesn't seem to be the case. It seems to be more -- all the
09:07:13 12 relief here is targeted toward Bell. But if the Court did
09:07:17 13 have concerns about what the Commission is doing, that Court
09:07:20 14 probably ought to be the Federal Circuit directly on review
09:07:24 15 of the Commission or by mandamus instead of having District
09:07:28 16 Courts potentially enjoining the Commission or enjoining
09:07:31 17 parties at the Commission.

09:07:33 18 THE COURT: Nobody's asked for enjoinder of the
09:07:35 19 Commission here; correct?

09:07:37 20 MR. ROSENZWEIG: No one's asked for enjoining of
09:07:39 21 the Commission, but the relief that's sought here is
09:07:41 22 unprecedented. And it's just a short little two-step where
09:07:45 23 the movants here complain that they would prefer not to be
09:07:50 24 encumbered with what they contend is simultaneous litigation
09:07:55 25 at the Commission and in this Court. And if, under the very

09:07:59 1 routine facts of this case the Court were to enjoin Bell
09:08:04 2 from participating, and I submit that there's no precedent
09:08:08 3 for that, but if the Court were to do that, that would
09:08:11 4 interfere with -- potentially interfere with a lot of
09:08:15 5 Commission cases.

09:08:16 6 THE COURT: You don't dispute, though, that a
09:08:18 7 District Court has the authority to enjoin a party from
09:08:22 8 participating in an ITC proceeding, do you?

09:08:25 9 MR. ROSENZWEIG: No, I don't dispute that. And
09:08:28 10 in this Court's decision in *Convertible Rowing*, Judge
09:08:31 11 Schwartz recognized that the Court could conceivably also
09:08:33 12 have the authority to enjoin the Commission directly, and
09:08:37 13 we're not here to challenge any of that.

09:08:39 14 In this case, you know, the Court cannot or
09:08:44 15 should not enjoin the Commission directly. It's not even
09:08:46 16 sought because the Commission isn't doing anything improper
09:08:49 17 to compromise this Court's jurisdiction. And, likewise, the
09:08:52 18 Court cannot or should not enjoin Bell because Bell is not
09:08:57 19 doing anything, much less anything improper to compromise
09:09:01 20 the Court's jurisdiction here.

09:09:03 21 THE COURT: Well, it's the "cannot," I guess.
09:09:04 22 I'm a little surprised. I understand the Commission might
09:09:08 23 say should not, but you're saying there's binding authority
09:09:12 24 that would preclude this Court from enjoining Bell?

09:09:17 25 MR. ROSENZWEIG: I would say that there's a lot

09:09:18 1 of authority that should give this Court a lot of caution
09:09:21 2 before exercising that authority, to the extent that the
09:09:24 3 Court has it.

09:09:25 4 THE COURT: That's a different thing than saying
09:09:26 5 "the Court cannot do it," though.

09:09:28 6 MR. ROSENZWEIG: I think -- under existing
09:09:31 7 precedent, the facts of this case do not warrant that
09:09:35 8 exercise of authority. It would be unprecedented. I'm not
09:09:39 9 here to purport to challenge the Court's authority. That
09:09:44 10 would be improper. It would be wrong. But there's no
09:09:47 11 situation in any decision, including in the decisions of
09:09:52 12 this district, that would provide for relief for the movants
09:09:57 13 to enjoin.

09:09:57 14 THE COURT: Including my own decision in the
09:10:00 15 *Philips* case?

09:10:00 16 MR. ROSENZWEIG: Yeah, absolutely.

09:10:01 17 THE COURT: Okay. All right. I just wanted
09:10:03 18 that clarification. Thank you.

09:10:05 19 MR. ROSENZWEIG: And I think just one other
09:10:06 20 thing that I would just note, if I could, is as to the
09:10:08 21 status of these two Commission investigations --

09:10:10 22 THE COURT: Yes, actually that would be helpful.

09:10:12 23 MR. ROSENZWEIG: Fact discovery, as I understand
09:10:14 24 it, closes in both cases next week, and the Markman
09:10:18 25 proceedings are completely concluded in one of the two

09:10:22 1 proceedings. A Markman Order was issued.

09:10:23 2 In the other one, a Markman ruling is expected
09:10:26 3 any day now because all of the briefing and the hearing have
09:10:30 4 already been conducted. And our trials are expected in both
09:10:34 5 before administrative law judges in August.

09:10:36 6 THE COURT: And do you think that trial date is
09:10:38 7 going to be kept?

09:10:40 8 MR. ROSENZWEIG: I would ask Bell and some of
09:10:44 9 the parties here who would have a little bit more
09:10:47 10 behind-the-scenes knowledge. I have no reason to believe
09:10:49 11 that those trial dates are moving, but I'm not in the best
09:10:54 12 position.

09:10:54 13 THE COURT: All right. Thank you. That was
09:10:56 14 helpful.

09:10:56 15 All right. Let's start with the motion to
09:10:57 16 dismiss.

09:11:12 17 MR. KAMPRATH: Good morning, Your Honor. I'm
09:11:13 18 Richard Kamprath with McKool Smith representing Bell.

09:11:17 19 THE COURT: All right.

09:11:29 20 MR. KAMPRATH: Thank you, Your Honor. We have
09:11:39 21 some slides we just passed to you, and I think we've got
09:11:42 22 some copies for everyone else as well. I think maybe we can
09:11:45 23 give you kind of a status update of the context of this
09:11:48 24 lawsuit and the other litigations that are going on.

09:11:55 25 So, about one year ago in April of 2022, Bell

09:12:01 1 Semiconductor started its licensing campaign and filed
09:12:04 2 ten District Court cases and one ITC case. And that ITC
09:12:10 3 case, Cadence intervened. We can talk about that.

09:12:13 4 In May of 2022, no cases were filed. In June of
09:12:18 5 2022, one District Court case was filed. In July, none were
09:12:22 6 filed. In August of 2022, 30 cases were filed, District
09:12:26 7 Court cases. September of 2022, seven more cases were
09:12:29 8 filed. October of 2022, 31 cases, including two ITC cases
09:12:34 9 were filed. November of 2022, eleven cases were filed. In
09:12:39 10 December of '22, one case was filed.

09:12:44 11 So, at the peak of the litigation campaign, Your
09:12:48 12 Honor, there were 24 entities that were sued and over 94
09:12:54 13 lawsuits. And part of the reason why there's so many
09:12:56 14 lawsuits, as Your Honor may know, the statute governing
09:12:59 15 patent suits requires filing a separate lawsuit against each
09:13:03 16 Defendant. You can't conglomerate them all and put them all
09:13:06 17 in one suit unless there's a similar nexus of facts relating
09:13:09 18 to all the infringement. So, 91 District Court cases, three
09:13:14 19 ITC investigations at the height of the campaign.

09:13:19 20 Since that time, 16 entities have resolved with
09:13:25 21 Bell Semi as of today, which means eight of those entities
09:13:28 22 remain with 28 District Court cases and the two ITC cases.

09:13:33 23 THE COURT: Well, when you say they've
09:13:35 24 "resolved," you're saying that the only cases that are
09:13:42 25 currently pending in a District Court are 28?

09:13:47 1 MR. KAMPRATH: Yes, sir. Yes, Your Honor.

09:13:48 2 THE COURT: Okay. Because I thought from the
09:13:49 3 briefing it sounded like there had been some settlements,
09:13:52 4 but the cases have not been actually dismissed?

09:13:54 5 MR. KAMPRATH: So, there are a number of cases
09:13:56 6 that have been dismissed because of resolution between the
09:13:58 7 parties.

09:13:59 8 THE COURT: Right. So, how many active cases
09:14:01 9 are there?

09:14:01 10 MR. KAMPRATH: Twenty-eight active District
09:14:03 11 Court cases, Your Honor, with two ITC cases.

09:14:05 12 THE COURT: All right. So, the remainder of the
09:14:07 13 91 have been dismissed?

09:14:09 14 MR. KAMPRATH: Yes, Your Honor, or in the --
09:14:10 15 have been -- there's been motion practice to dismiss and --

09:14:13 16 THE COURT: It's important -- well, you've got
09:14:14 17 to be really straight with me here. I didn't ask -- I
09:14:17 18 asked: Are they pending? Are they in existence?

09:14:19 19 And for you to say that, Yes, they're either
09:14:22 20 dismissed or there's motions pending, then that means the
09:14:26 21 cases haven't been closed or dismissed yet.

09:14:28 22 MR. KAMPRATH: Understood, Your Honor.

09:14:29 23 THE COURT: So, let's be really careful. Let's
09:14:31 24 be accurate.

09:14:33 25 Are there only 28 pending District Court actions

09:14:37 1 currently?

09:14:38 2 MR. KAMPRATH: No.

09:14:39 3 THE COURT: Okay.

09:14:39 4 MR. KAMPRATH: There are --

09:14:40 5 THE COURT: So, what's the real number?

09:14:41 6 MR. KAMPRATH: So, I don't have that real
09:14:42 7 number. The cases that are not the 28 currently pending
09:14:46 8 cases, those cases include cases that have been dismissed
09:14:50 9 and cases where motions to dismiss have been filed because
09:14:53 10 of resolution between the parties. And we're waiting on the
09:14:56 11 Court to rule.

09:14:58 12 THE COURT: All right. So, there's 28 cases
09:15:00 13 where there's --

09:15:01 14 MR. KAMPRATH: Active.

09:15:02 15 THE COURT: -- active litigation?

09:15:03 16 MR. KAMPRATH: Yes, Your Honor.

09:15:03 17 THE COURT: All right. What is the most
09:15:05 18 advanced of those 28 cases?

09:15:07 19 MR. KAMPRATH: Yes, Your Honor. So, the -- some
09:15:09 20 of the cases that were filed in April of last year,
09:15:12 21 including the *NXP* case, that case is in -- we have a number
09:15:18 22 of cases that are in discovery. There's been discovery
09:15:22 23 proceeding.

09:15:22 24 The *NXP* case in California has Markman briefing
09:15:25 25 going on right now. The Markman hearing is next month, and

09:15:28 1 so we'll be through Markman at that time.

09:15:30 2 THE COURT: And that's a Northern District of
09:15:33 3 California case; is that right?

09:15:33 4 MR. KAMPRATH: I believe so, Your Honor.

09:15:34 5 THE COURT: Okay. And who's handling that case?

09:15:38 6 MR. KAMPRATH: Representing Bell?

09:15:40 7 THE COURT: No, I'm sorry. What judge is
09:15:42 8 handling the case?

09:15:42 9 MR. KAMPRATH: I don't have that judge's name
09:15:45 10 right in front of me, but we can find that out and give it
09:15:47 11 to Your Honor.

09:15:47 12 THE COURT: Now, the *Omni* case -- so, are there
09:15:50 13 three *Omni* cases?

09:15:51 14 MR. KAMPRATH: In District Court or in ITC?

09:15:53 15 THE COURT: Sorry. In District Court.

09:15:55 16 MR. KAMPRATH: There are -- I think there are
09:15:56 17 three *Omni* cases and then there's -- one of the ITC cases
09:15:59 18 includes *Omnivision*, as well.

09:16:01 19 THE COURT: All right. The three District Court
09:16:03 20 *Omni* cases are also in the Northern District of California;
09:16:05 21 is that correct?

09:16:06 22 MR. KAMPRATH: I believe that's right,
09:16:07 23 Your Honor.

09:16:07 24 THE COURT: And they've been stayed, at least
09:16:09 25 pending what I do here; is that fair?

09:16:11 1 MR. KAMPRATH: As of three days ago, yes, Your
09:16:13 2 Honor.

09:16:13 3 THE COURT: All right. Now, where were those
09:16:15 4 cases in terms of the timeline of the litigation?

09:16:19 5 MR. KAMPRATH: So, those were not as far along.
09:16:22 6 Those were in the motion to dismiss stage.

09:16:24 7 THE COURT: All right. Had there been discovery
09:16:26 8 taken?

09:16:26 9 MR. KAMPRATH: No, Your Honor. And those are in
09:16:29 10 front of Judge Huff.

09:16:30 11 THE COURT: I thought they were Judge Kronstadt.

09:16:32 12 MR. KAMPRATH: The *Omnivision* cases are
09:16:34 13 Judge Kronstadt. The *NXP* was Judge Huff, Your Honor.
09:16:38 14 Sorry, Your Honor.

09:16:38 15 THE COURT: No, no. It's okay.

09:16:40 16 Okay. All right. So, the bottom line is there
09:16:41 17 are still 28 active District Court cases going on against --

09:16:50 18 MR. KAMPRATH: Eight remaining.

09:16:51 19 THE COURT: -- eight entities, all of whom use
09:16:55 20 the software made by one of the three Plaintiffs in the two
09:17:02 21 actions before me?

09:17:03 22 MR. KAMPRATH: Correct, Your Honor.

09:17:04 23 THE COURT: Okay. Is it fair to say that
09:17:07 24 there's an allegation in the Complaints in each of those
09:17:09 25 actions that specifically alleges, under an infringement

09:17:15 1 count, that the EDA software that provides a basis for an
09:17:23 2 infringement claim was made, manufactured or provided by at
09:17:29 3 least one of the three Defendants in my case?

09:17:31 4 MR. KAMPRATH: So, Your Honor, if I understand
09:17:33 5 your question correctly, is there an infringement allegation
09:17:39 6 in the underlying District Court cases that form -- based on
09:17:44 7 Cadence, Siemens, or Synopsys tools, that forms a basis for
09:17:48 8 infringement -- an infringement allegation against Cadence,
09:17:51 9 Siemens, or Synopsys, or for the underlying accused
09:17:54 10 infringers?

09:17:55 11 THE COURT: Well, those cases are only directed
09:17:59 12 against the accused infringer.

09:18:00 13 MR. KAMPRATH: Correct, Your Honor.

09:18:01 14 THE COURT: So, I'm only interested in the
09:18:02 15 allegation against the accused infringers.

09:18:05 16 Is it based on an allegation that those accused
09:18:09 17 infringers use the software manufactured by one of the three
09:18:18 18 Plaintiffs in my actions?

09:18:19 19 MR. KAMPRATH: Yes, Your Honor.

09:18:20 20 THE COURT: Okay. So, they are -- this is
09:18:23 21 situated just like the *Omni* cases?

09:18:25 22 MR. KAMPRATH: Yes, Your Honor.

09:18:26 23 THE COURT: Okay. Thank you.

09:18:26 24 MR. KAMPRATH: In general.

09:18:27 25 And the one clarification I will make to you,

09:18:30 1 and this is part of what we can talk about, is each of the
09:18:33 2 underlying cases when those Complaints were filed, they each
09:18:38 3 had a chart attached to the Complaint. Each of those charts
09:18:42 4 has one -- at least one claim, one -- for one of the patents
09:18:46 5 that discusses how we believe -- how Bell believes that
09:18:51 6 patent claim is met by use of one of those EDA tools.

09:18:57 7 Those -- none of those charts have evidence or
09:19:00 8 show user manuals or things from every single one of
09:19:03 9 Cadence, Siemens, and Synopsys.

09:19:05 10 THE COURT: But they reference one of them. At
09:19:08 11 least one, but just not all three?

09:19:10 12 MR. KAMPRATH: Yes, Your Honor.

09:19:11 13 THE COURT: Okay. But isn't that enough to
09:19:14 14 create a controversy?

09:19:16 15 MR. KAMPRATH: So, Your Honor, that's the
09:19:18 16 question, right. And so, for DJ jurisdiction, we don't
09:19:22 17 believe so. And just -- I will tell you, I know we were
09:19:27 18 talking about the *Omnivision* case. There was also a motion
09:19:31 19 to stay based on this District Court -- these DJ cases filed
09:19:36 20 in the *NXP* case --

09:19:37 21 THE COURT: That was denied?

09:19:38 22 MR. KAMPRATH: -- that was denied in January.
09:19:40 23 Yes, Your Honor.

09:19:41 24 And I have a copy of that, if you want me to
09:19:43 25 bring it up.

09:19:43 1 THE COURT: Yeah, sure. You can hand it up.
09:19:45 2 Thank you.

09:19:57 3 Do you want to point out to me anything in
09:20:09 4 particular in this decision?

09:20:10 5 MR. KAMPRATH: No, Your Honor, other than the
09:20:12 6 same issues that were in front of Judge Kronstadt were also
09:20:15 7 in front of Judge Huff, and she decided differently. That
09:20:19 8 the other case under the first to file rule and the
09:20:23 9 customer-suit exception, that the customer-suit exception
09:20:26 10 should not apply and that her cases should go forward.

09:20:36 11 And my partner, Josh Newcomer, is going to
09:20:39 12 address the preliminary injunction motion. He can speak
09:20:41 13 more to the first to file rule, Your Honor.

09:20:44 14 THE COURT: Okay. All right. Thank you.

09:20:50 15 MR. KAMPRATH: So, Your Honor, this Court does
09:20:55 16 not have subject matter jurisdiction over these cases
09:20:58 17 because the Plaintiffs have failed to plead facts to support
09:21:01 18 subject matter jurisdiction in their Complaint, and because,
09:21:04 19 under Federal Circuit law, they could and can join the
09:21:08 20 pending underlying cases against the accused infringers.

09:21:11 21 THE COURT: All right. So, is this a facial or
09:21:13 22 a factual attack on jurisdiction?

09:21:16 23 MR. KAMPRATH: Great question, Your Honor. We
09:21:17 24 believe that there's no subject matter jurisdiction under
09:21:21 25 either standard.

09:21:22 1 THE COURT: Okay. But what did you mount?

09:21:24 2 MR. KAMPRATH: So, we mounted both.

09:21:25 3 THE COURT: Oh, you mounted both. Okay.

09:21:27 4 MR. KAMPRATH: And here is the problem and why
09:21:29 5 it's a great question. At the time the Complaint was filed,
09:21:33 6 we believe that facially there's no subject matter
09:21:35 7 jurisdiction based on the Complaint itself.

09:21:38 8 The issue, as Your Honor knows, is the Complaint
09:21:41 9 was filed and then there was discovery taken related to the
09:21:43 10 preliminary injunction. And there have been things and
09:21:46 11 facts that have come to light that also support a factual
09:21:49 12 attack on the Complaint and that there's a lack of subject
09:21:52 13 matter jurisdiction. But we believe you could look at the
09:21:55 14 Complaint itself and facially there is no subject matter
09:21:59 15 jurisdiction.

09:21:59 16 THE COURT: All right.

09:22:02 17 MR. KAMPRATH: So, a few things just to start.
09:22:05 18 This is from the *Applied Materials* case: "The burden is on
09:22:09 19 the DJ Plaintiffs to prove and to establish subject matter
09:22:12 20 jurisdiction," as Your Honor knows.

09:22:14 21 THE COURT: Actually, why are you citing a
09:22:17 22 Federal Circuit case? Isn't this a Third Circuit question?

09:22:19 23 MR. KAMPRATH: It is a Third Circuit question,
09:22:20 24 unless it has to do with patent law. And in this case, the
09:22:25 25 subject matter jurisdiction question has been addressed by

09:22:27 1 Federal Circuit as well.

09:22:29 2 THE COURT: But in the *Mitek* case, the Federal
09:22:32 3 Circuit relied on Fifth Circuit law because it was Texas
09:22:34 4 law.

09:22:35 5 MR. KAMPRATH: Correct.

09:22:35 6 THE COURT: So, wouldn't the Federal Circuit
09:22:36 7 rely on Third Circuit law in this case?

09:22:39 8 MR. KAMPRATH: Correct, Your Honor. It would be
09:22:39 9 Third Circuit law.

09:22:40 10 THE COURT: All right.

09:22:42 11 MR. KAMPRATH: Jurisdiction must be determined
09:22:49 12 at the time of the filing of the Complaint, Your Honor, and
09:22:52 13 has to continue throughout the case. And so, why we
09:22:55 14 initially filed a patent and have the facial attack is the
09:22:58 15 pleadings and the Complaints in these two cases are not
09:23:01 16 sufficient to show subject matter jurisdiction.

09:23:04 17 And a big part of that -- and the reason why
09:23:11 18 their Complaint fails facially is because the pleadings in
09:23:13 19 the Complaint are not pled on a specific
09:23:16 20 Plaintiff-by-Plaintiff, claim-by-claim, patent-by-patent
09:23:20 21 analysis.

09:23:22 22 Many of the statements are inferences or the
09:23:24 23 statements in the Complaint say "DJ Plaintiffs have this,"
09:23:28 24 or "something has happened to these DJ Plaintiffs," or "they
09:23:31 25 have indemnity or defense obligations." There's no specific

09:23:35 1 pleading in the Complaint as to each of the DJ Plaintiffs
09:23:37 2 and what's happening between them and each of the causes of
09:23:40 3 action.

09:23:41 4 THE COURT: Well, the Complaints -- and you're
09:23:45 5 going to treat them -- I think we're all going to treat the
09:23:48 6 two different actions here the same; is that fair?

09:23:52 7 I mean, do we need to break apart what's said in
09:23:55 8 the 1512 -- or what is it, 1516 action?

09:23:59 9 MR. KAMPRATH: From our point of view, you can
09:24:00 10 treat them similarly, Your Honor.

09:24:02 11 THE COURT: All right. What do you all think?

09:24:04 12 MS. SCHWARTZ: Yes, Your Honor. For the most
09:24:06 13 part, they're identical for these purposes.

09:24:10 14 THE COURT: Okay. So, we've got these
09:24:11 15 Complaints. They allege that you're engaged in, to use your
09:24:18 16 words this morning, "a licensing campaign."

09:24:21 17 Right?

09:24:22 18 MR. KAMPRATH: Yes, Your Honor.

09:24:23 19 THE COURT: Which involves bringing lawsuits --

09:24:24 20 MR. KAMPRATH: Yes, Your Honor.

09:24:25 21 THE COURT: -- against Defendants. That's
09:24:26 22 alleged.

09:24:27 23 It's alleged that the Defendants in those
09:24:30 24 actions are customers of the Plaintiffs in these actions;
09:24:36 25 correct?

09:24:36 1 MR. KAMPRATH: Yes, Your Honor.

09:24:36 2 THE COURT: It's alleged that the Complaints in
09:24:41 3 the underlying actions all allege, as I think you've
09:24:46 4 admitted, that the infringement claims are based on the
09:24:54 5 Defendant customer's use of software provided and
09:25:02 6 manufactured by one of the three Defendants -- one of the
09:25:06 7 three Plaintiffs in my cases; correct?

09:25:08 8 MR. KAMPRATH: Correct, Your Honor.

09:25:09 9 THE COURT: All right. So, they've got lawsuits
09:25:12 10 that allege infringement based on alleged use of the
09:25:21 11 software manufactured by one of the three Plaintiffs here.

09:25:27 12 Isn't that enough on *Mitek*? I mean, that seems
09:25:31 13 to provide a reasonable apprehension of being sued for
09:25:38 14 infringement, which is all that's required; isn't it?

09:25:41 15 MR. KAMPRATH: Your Honor, excuse me. I'm
09:25:45 16 overcoming allergies this week.

09:25:47 17 The mere allegation of infringement in an
09:25:50 18 underlying District Court case cannot serve as the basis for
09:25:54 19 DJ allegations in a subsequent case.

09:25:57 20 THE COURT: And where is the law that says that?

09:25:59 21 MR. KAMPRATH: Your Honor, that is the *DataTern*
09:26:01 22 case. It's *DataTern*, 755 F.3d 899.

09:26:12 23 THE COURT: Do you have a copy of it?

09:26:14 24 MR. KAMPRATH: I do not have a copy.

09:26:15 25 THE COURT: All right. So, it's *DataTern*. Give

09:26:17 1 me the cite.

09:26:18 2 MR. KAMPRATH: I'm sorry, Your Honor. It's
09:26:20 3 *Microsoft Corp. v. DataTern Incorporated.*

09:26:23 4 THE COURT: Okay.

09:26:24 5 MR. KAMPRATH: 755 F.3d 899.

09:26:28 6 MS. SCHWARTZ: Your Honor, I have copies if
09:26:31 7 you'd like one.

09:26:32 8 THE COURT: May I see a copy? Yeah. Do you
09:26:34 9 have multiple copies of it?

09:26:36 10 MS. SCHWARTZ: I do.

09:26:36 11 THE COURT: Can you provide one to Mr. -- is
09:26:37 12 that how you pronounce it, Kamprath?

09:26:39 13 MR. KAMPRATH: Kamprath. I have my own copy.

09:26:42 14 THE COURT: Oh, you have your own copy?

09:26:43 15 MR. KAMPRATH: Yes.

09:26:43 16 THE COURT: Great. Mr. Kamprath, maybe you can
09:26:46 17 show me in the case, just so I'm very comfortable with what
09:26:49 18 you said.

09:26:50 19 MR. KAMPRATH: Yes, Your Honor.

09:26:50 20 THE COURT: Thanks.

09:26:56 21 MR. KAMPRATH: On Page 904, there's a paragraph
09:27:03 22 that starts -- and I'll read it to you, Your Honor.

09:27:06 23 THE COURT: Hold on a second.

09:27:50 24 Okay. And you're referring to Page 904?

09:27:56 25 MR. KAMPRATH: Yes, Your Honor.

09:27:56 1 THE COURT: Okay.

09:27:56 2 MR. KAMPRATH: And it's the paragraph that
09:27:56 3 starts, "To the extent that appellees argue that they have a
09:27:58 4 right to bring a declaratory judgment action solely because
09:28:02 5 their customers have been sued for direct infringement, they
09:28:06 6 are incorrect."

09:28:06 7 And what *DataTern* goes on to say is there has to
09:28:12 8 be another basis. And it talks about four different bases,
09:28:16 9 Your Honor.

09:28:17 10 THE COURT: Mm-hmm.

09:28:17 11 MR. KAMPRATH: Indemnity obligations or subject
09:28:21 12 matter jurisdiction based on reasonable apprehension that
09:28:24 13 the DJ Plaintiffs would be sued for direct infringement,
09:28:27 14 indirect infringement, which is inducement, or contributory
09:28:31 15 infringement.

09:28:31 16 And I plan to discuss those four, Your Honor.

09:29:03 17 THE COURT: I guess my problem with this is it's
09:29:08 18 true the sentence says exactly what you said, but the facts
09:29:13 19 I just articulated go beyond that.

09:29:18 20 I articulated, among other things, that the
09:29:22 21 Complaints in the underlying actions allege that the
09:29:31 22 customer Defendants infringed the patents because they used
09:29:40 23 the software provided by the Plaintiffs in this action. But
09:29:47 24 it seems to be not necessarily covered by the statement that
09:29:53 25 solely because customers have been sued for direct

09:29:57 1 infringement, there is jurisdiction for a DJ action.

09:30:02 2 MR. KAMPRATH: So, Your Honor, this case -- the
09:30:04 3 *DataTern* -- *Microsoft v. DataTern* case is very seminal for
09:30:09 4 us in deciding this case. And what *DataTern* says, and in
09:30:13 5 that case there were three patents asserted. And what the
09:30:18 6 Court did is it went through and looked at were there
09:30:21 7 indemnity obligations --

09:30:23 8 THE COURT: I know it did.

09:30:23 9 MR. KAMPRATH: -- direct infringement --

09:30:25 10 THE COURT: And, frankly, I think there's
09:30:26 11 probably a really good argument that there is sufficient
09:30:29 12 allegations of indemnity obligation, but I want to focus --
09:30:33 13 especially when I look at *Mitek*, and when I think about the
09:30:36 14 Supreme Court jurisprudence on this, and I think the test is
09:30:42 15 whether there's a reasonable apprehension of alleged
09:30:45 16 liability.

09:30:46 17 That would be ultimately the test. You agree;
09:30:48 18 right?

09:30:48 19 MR. KAMPRATH: Yes, Your Honor.

09:30:49 20 THE COURT: All right. So, what I'm trying to
09:30:51 21 understand, and I agree about the sentence here, but I'm
09:30:55 22 trying to understand why a litigation/licensing campaign
09:31:01 23 that involves suing over 90 customers that alleges
09:31:06 24 infringement, based solely on the use of the software to
09:31:11 25 design or to employ the methods covered by the patents, why

09:31:20 1 that doesn't create a reasonable apprehension of alleged
09:31:27 2 liability.

09:31:27 3 And I agree you have this sentence here, but I
09:31:29 4 read that sentence in isolation at least just to say the
09:31:33 5 fact that somebody sued a customer of a DJ Plaintiff isn't
09:31:39 6 sufficient to create Article III jurisdiction.

09:31:45 7 MR. KAMPRATH: Correct, Your Honor. So, the
09:31:47 8 *DataTern* case had a very similar fact pattern, as we're
09:31:51 9 discussing.

09:31:51 10 So, I think that sentence is the starting point.
09:31:54 11 And it answers your question: Is the mere lawsuit itself
09:31:57 12 enough? And the answer is no based on that.

09:31:59 13 THE COURT: Again, it's not "the mere lawsuit."

09:32:00 14 MR. KAMPRATH: That's right.

09:32:01 15 THE COURT: If you've got specific allegations
09:32:03 16 in the Complaint in this -- in the Complaints plural.

09:32:05 17 MR. KAMPRATH: Correct. And, Your Honor, I
09:32:06 18 think that's the next step is the Court has to analyze, what
09:32:10 19 are those allegations in the Complaint? And then what
09:32:13 20 you -- but you have to look at it in the specific causes of
09:32:16 21 action that the DJ Plaintiffs are bringing. It has to be
09:32:19 22 under direct infringement, inducement or contributory
09:32:23 23 infringement. It can't just be in the abstract by itself.
09:32:26 24 Is there enough subject matter jurisdiction?

09:32:29 25 The question is: Is there subject matter

09:32:31 1 jurisdiction for one or each of those, an allegation of
09:32:34 2 direct infringement, inducement or contributory
09:32:37 3 infringement?

09:32:37 4 THE COURT: All right. What was the allegation,
09:32:41 5 the factual allegations in the Complaints in the *Microsoft*
09:32:45 6 v. *DataTern* case?

09:32:46 7 MR. KAMPRATH: They similarly, Your Honor, had
09:32:49 8 claim charts that showed how the patents were being used by
09:32:55 9 the customers based on Microsoft, for example, user guides
09:33:00 10 and manuals. So, it's similar to this case, Your Honor.

09:33:03 11 So, there are three patents. Two of the patents
09:33:07 12 the Court found it had subject matter jurisdiction based on
09:33:11 13 those manuals and the plus factor, and we can get into that.

09:33:15 14 But for the third patent that did not sue -- did
09:33:18 15 not cite user manuals, but cited third-party materials, the
09:33:22 16 Court found it did not have subject matter jurisdiction for
09:33:26 17 inducement because there wasn't any evidence in those charts
09:33:28 18 that Microsoft was encouraging others to directly infringe.
09:33:32 19 And that's why *DataTern* -- you've got to look at the
09:33:34 20 specific causes of action, direct infringement, inducement
09:33:37 21 and/or contributory infringement.

09:33:40 22 THE COURT: All right. You don't see any
09:33:54 23 tension between *Microsoft* against *DataTern* and the *Mitek*
09:33:59 24 case which is much more recent?

09:34:01 25 MR. KAMPRATH: No, Your Honor.

09:34:02 1 THE COURT: Okay. All right. I don't want to
09:34:05 2 dwell because we've got to watch time on this issue. Let's
09:34:09 3 turn to -- you would agree that under *DataTern* -- and you do
09:34:14 4 agree in your briefing that a reasonable apprehension of
09:34:25 5 being subject to indemnification obligation would create a
09:34:30 6 case in controversy jurisdiction; right?

09:34:32 7 MR. KAMPRATH: If that's alleged in the
09:34:35 8 Complaint, yes, Your Honor.

09:34:35 9 THE COURT: Okay. All right. Why isn't it
09:34:36 10 alleged here?

09:34:37 11 MR. KAMPRATH: Great question. So, here on
09:34:38 12 Slide 9 is a citation from the Synopsys and Cadence
09:34:43 13 Complaint. This is their basis for saying that there are
09:34:46 14 indemnity obligations, and there are a couple problems with
09:34:49 15 it.

09:34:49 16 Number one, it says that the customers have
09:34:53 17 entered into license agreements with the Plaintiffs. We
09:34:55 18 don't know which customers have entered into license
09:34:58 19 agreements. We don't know which Plaintiffs have entered
09:35:00 20 into license agreements.

09:35:01 21 THE COURT: They only have to have one.

09:35:02 22 MR. KAMPRATH: For each of the DJ Plaintiffs,
09:35:04 23 Your Honor, and we don't know that each of the DJ Plaintiffs
09:35:07 24 have those licenses with customers.

09:35:09 25 THE COURT: So, your only beef here is it says

09:35:12 1 Plaintiffs, it doesn't say which of the two Plaintiffs in
09:35:15 2 1512; is that right?

09:35:16 3 MR. KAMPRATH: That's the first beef we have.

09:35:18 4 THE COURT: All right. Well, that seems to
09:35:19 5 be -- that's not going to pass muster here. I mean, you
09:35:22 6 know, I agree it would be ideal that it identifies which,
09:35:30 7 but that's not -- I don't think that that's compelling.

09:35:33 8 MR. KAMPRATH: Fair enough.

09:35:34 9 THE COURT: And it can be corrected quickly.

09:35:35 10 MR. KAMPRATH: It could be, Your Honor.

09:35:37 11 THE COURT: All right.

09:35:37 12 MR. KAMPRATH: Secondly, the sentence says, "The
09:35:40 13 license agreements contain defense and/or indemnity
09:35:43 14 provisions."

09:35:44 15 This is the bigger problem, Your Honor. There's
09:35:47 16 been no citation to any case law where a defense obligation
09:35:50 17 can give rise to subject matter jurisdiction. It's
09:35:54 18 indemnity obligations.

09:35:55 19 So, we here have another ambiguity that we don't
09:35:57 20 know if it's defense or indemnity provisions. Again, this
09:36:01 21 is just in the Complaint, and we're looking at what the
09:36:04 22 Complaint says.

09:36:05 23 THE COURT: Well, there's no case that says the
09:36:07 24 defense obligation isn't sufficient, is there?

09:36:09 25 MR. KAMPRATH: Not that we've found, Your Honor.

09:36:10 1 THE COURT: Right.

09:36:11 2 MR. KAMPRATH: But, Your Honor, I would
09:36:14 3 recommend if that's the case, if it's all defense
09:36:16 4 obligations, then the proper course of action would be for
09:36:19 5 the DJ Plaintiffs to go and defend the underlying cases that
09:36:23 6 have --

09:36:23 7 THE COURT: Look, I agree that, you know, that's
09:36:26 8 true. They could do that. But let me tell you what I find
09:36:31 9 really compelling. It's what the Supreme Court says about
09:36:35 10 DJ actions because, ultimately, we all work under what the
09:36:39 11 Supreme Court says.

09:36:42 12 And I was really taken by what the Supreme Court
09:37:05 13 said in the *Kerotest* case that you all cited. The Court
09:37:17 14 said, "The Federal Declaratory Judgments Act, facilitating
09:37:22 15 as it does the initiation of litigation by different parties
09:37:26 16 to many-sided transactions, has created complicated problems
09:37:31 17 for coordinate courts. Wise judicial administration giving
09:37:38 18 regard to conservation of judicial resources and
09:37:43 19 comprehensive disposition of litigation does not counsel
09:37:47 20 rigid mechanical solution of such problems.

09:37:52 21 "The factors relevant to wise administration
09:37:55 22 here are equitable in nature. Necessarily, an ample degree
09:38:01 23 of discretion, appropriate for disciplined and experienced
09:38:06 24 judges, must be left to the lower courts."

09:38:09 25 MR. KAMPRATH: Completely agree.

09:38:10 1 THE COURT: So, you're right. They could go
09:38:11 2 intervene in 90-some cases. But I think wise, experienced,
09:38:19 3 disciplined judges would say, That's not a really good
09:38:22 4 solution.

09:38:25 5 MR. KAMPRATH: Your Honor, I would respectfully
09:38:27 6 disagree and let me tell you why. The underlying lawsuits,
09:38:31 7 some of which, as you know, we've discussed have been
09:38:33 8 pending for over a year and are already advanced. The DJ
09:38:38 9 Plaintiffs have discussed that some of the issues that are
09:38:41 10 at issue in this case overlap with the same exact issues in
09:38:45 11 those cases and will be decided before -- presumably before
09:38:48 12 this case or these cases would go to trial.

09:38:51 13 The bigger issue, Your Honor, is that the facts
09:38:56 14 regarding infringement in those underlining cases, those
09:39:00 15 facts -- that evidence is generally not going to be with the
09:39:02 16 DJ Plaintiffs. Some of that will be with the DJ Plaintiffs,
09:39:06 17 the software and how it works. But the who, what, when,
09:39:09 18 where and why of how those method claims that are asserted
09:39:13 19 in the underlying cases, how those are infringed, the DJ
09:39:17 20 Plaintiffs don't have any of that evidence.

09:39:19 21 So, the underlying cases will resolve a ton of
09:39:22 22 different issues, including specific acts of infringement by
09:39:25 23 the accused infringers. The issues that would need to be
09:39:30 24 resolved in this case are a subset of those issues that
09:39:33 25 could be resolved in the underlying cases as well.

09:39:35 1 And, Your Honor, I would recommend or just
09:39:38 2 mention the DJ Plaintiffs would not have to intervene in
09:39:43 3 90 cases. As we discussed, a number of those have been
09:39:45 4 resolved with the underlying Defendants.

09:39:49 5 There would be at least one case that they could
09:39:52 6 have -- they could intervene, and they could participate in
09:39:55 7 the case, fully adjudicate the issues that are relevant to
09:39:59 8 them that are related to the actual underlying issues of the
09:40:02 9 who, what, when, where, why and how the accused defenders in
09:40:07 10 the underlying cases are infringing.

09:40:08 11 THE COURT: All right. Well, this all came up
09:40:10 12 and kind of got into the preliminary injunction issue
09:40:14 13 really, but it came up in response to when you were positing
09:40:18 14 that this idea, defense versus indemnity somehow is
09:40:28 15 meaningful.

09:40:29 16 MR. KAMPRATH: Correct, Your Honor.

09:40:29 17 THE COURT: And that the obligation to defend
09:40:33 18 would not give rise to jurisdiction, as I understood your
09:40:37 19 argument --

09:40:38 20 MR. KAMPRATH: Correct, Your Honor.

09:40:39 21 THE COURT: -- because they could intervene.

09:40:41 22 MR. KAMPRATH: Correct, Your Honor.

09:40:42 23 THE COURT: Right. But regardless, the
09:40:46 24 obligation to defend imposes expense. And if they have to
09:40:53 25 bear that expense or if there's a reasonable apprehension

09:40:56 1 that they would have to bear that expense, that seems to
09:40:59 2 give rise to a case of controversy.

09:41:04 3 MR. KAMPRATH: So, Your Honor, that's an
09:41:05 4 excellent point, and I think that's where the factual attack
09:41:08 5 comes into play. And I defer to my colleague, Mr. Newcomer,
09:41:13 6 as well.

09:41:14 7 But since the filing of the Complaint, there
09:41:16 8 have been a number of discovery items that have happened,
09:41:20 9 document production, depositions so far. And, number one,
09:41:26 10 there's been no evidence of any indemnity obligations that
09:41:29 11 have been fulfilled. But there are only a handful -- and,
09:41:33 12 again, we can get into this, but there are only a handful or
09:41:36 13 very few defense obligations that have been asked for,
09:41:39 14 received, and --

09:41:40 15 THE COURT: So, I agree. It may not be as
09:41:43 16 fulsome as the rather vague allegations in the Complaint
09:41:48 17 would suggest. But at the end of the day, don't I now have
09:41:51 18 a record that at least -- well, that each Plaintiff has been
09:42:09 19 in receipt of at least one request for indemnification or
09:42:14 20 defense coverage? Is that not fair?

09:42:16 21 MR. KAMPRATH: Yes, it is, Your Honor.

09:42:17 22 THE COURT: Okay. And isn't that enough by
09:42:19 23 itself to create a case for controversy, a reasonable
09:42:23 24 apprehension that the Plaintiffs are going to have to incur
09:42:30 25 some cost related to these cases?

09:42:34 1 MR. KAMPRATH: Facially, Your Honor, that might
09:42:36 2 be correct. And that's the problem here. Factually --

09:42:39 3 THE COURT: No, it is factual because I thought
09:42:41 4 it's based on affidavits.

09:42:43 5 MR. KAMPRATH: That's right.

09:42:44 6 THE COURT: Right. Affidavits; right? So, it
09:42:46 7 is factual.

09:42:46 8 Now, it may be that you've got a better argument
09:42:48 9 like, Well, they overstated the case or that, Hey, many, if
09:42:53 10 not most, of these underlying Defendants are not going to
09:42:59 11 make, or have not made, or will not make defense or
09:43:04 12 indemnity requests. But they only need one.

09:43:08 13 MR. KAMPRATH: They need one for a facial
09:43:11 14 attack, Your Honor. But we would submit --

09:43:12 15 THE COURT: Why don't they need one for a
09:43:14 16 factual attack?

09:43:15 17 MR. KAMPRATH: For a factual -- remember, they
09:43:17 18 have to have subject matter jurisdiction throughout the
09:43:20 19 case, and so this is -- kind of the complicated part is
09:43:22 20 we've been looking at and talking about the Complaint and at
09:43:25 21 the time of the Complaint.

09:43:26 22 But now, if there are new facts where they've
09:43:28 23 lacked subject matter jurisdiction because, for example,
09:43:31 24 there are no indemnity obligations or they're fighting
09:43:35 25 against their own customers, that changes course. And so,

09:43:37 1 that's why it's a complicated analysis of looking at the
09:43:40 2 Complaint. There has to be subject matter jurisdiction
09:43:43 3 then, but it has to continue throughout the case.

09:43:45 4 And so, part of the reason why we bring this up
09:43:49 5 in discretionary denial is that there are changed facts that
09:43:53 6 have happened. And so, even if you accept the allegations
09:43:56 7 as true and even if you say those allegations are sufficient
09:43:59 8 for subject matter jurisdiction at the time of the
09:44:02 9 Complaint, we believe the facts that have come out since
09:44:06 10 then don't support that allegation.

09:44:09 11 THE COURT: And a factual analysis is not based
09:44:12 12 on the time -- or I should say, rather, it's not determined
09:44:17 13 based on the time of the filing of the Complaint, it's based
09:44:20 14 on the current state of affairs.

09:44:22 15 Is that your position?

09:44:23 16 MR. KAMPRATH: Correct. Technically it would be
09:44:26 17 based on both, and if there's -- at any time there was
09:44:29 18 insufficient subject matter jurisdiction. But you're right,
09:44:31 19 Your Honor.

09:44:32 20 THE COURT: Okay. All right.

09:44:34 21 MR. KAMPRATH: The last -- I mean, we can go
09:44:37 22 back and talk about the other subject matter jurisdiction
09:44:41 23 issues as we talk. There's indemnity obligations. We think
09:44:45 24 there are issues there.

09:44:46 25 There's indirect infringement, inducement,

09:44:49 1 contributory infringement. We think there are issues there.

09:44:51 2 There's direct infringement allegations. We

09:44:53 3 think there are issues there.

09:44:58 4 THE COURT: You want to hit what those issues

09:45:00 5 are?

09:45:00 6 MR. KAMPRATH: Yes, Your Honor.

09:45:09 7 Again, we will turn to *DataTern*. As we

09:45:11 8 discussed, *DataTern* looks at just the filing of the lawsuit

09:45:15 9 itself is not enough for DJ jurisdiction. But as we've

09:45:18 10 discussed, if there's more, and in the *DataTern* there was,

09:45:20 11 and in this case there is more. If there's more, such as

09:45:23 12 charts that show and are pointing to a third party, such as

09:45:26 13 the DJ Plaintiffs here, and their software being used, that

09:45:31 14 could form the basis for a DJ -- for DJ jurisdiction for

09:45:34 15 specific claims. And here, those claims would be -- are the

09:45:38 16 ones that were pled: contributory infringement, inducement,

09:45:41 17 and direct infringement.

09:45:43 18 So, for contributory infringement, the *DataTern*

09:45:46 19 case tells us to look at the statute, 35 U.S.C. 271(c)

09:45:51 20 requires a product -- if it's going to be a contributory --

09:45:56 21 if it's going to be a contributory product to infringement,

09:45:59 22 it cannot be a staple article or commodity of commerce

09:46:03 23 suitable for substantial non-infringing use.

09:46:07 24 So, we look at what was pled in the Complaint.

09:46:13 25 We have multiple paragraphs in the *Synopsys v. Cadence* or

09:46:17 1 Synopsys and Cadence Complaint, Paragraph 2, 3, 5 and 6.
09:46:22 2 Paragraph 4 is here, but the other paragraphs are 2, 3, 5
09:46:25 3 and 6 that discuss how Cadence, Siemens, and Synopsys'
09:46:28 4 different products work and what they're used for.

09:46:31 5 At a high level, Your Honor, these products are
09:46:33 6 circuit design products. They're software that allows
09:46:36 7 engineers and circuit designers to design very complicated
09:46:39 8 chips.

09:46:40 9 I've been an engineer. I was a soft or a
09:46:43 10 hardware engineer myself. These products can be used to
09:46:46 11 design a whole bunch of different chips. They're used for
09:46:49 12 designing digital chips, analog chips, mixed signal chips, a
09:46:54 13 whole bunch of different types of chips.

09:46:57 14 There's no evidence and there's no pleading in
09:46:58 15 the Complaints that these products do not have a substantial
09:47:02 16 non-infringing use. And, in fact, as we see in these
09:47:06 17 paragraphs, it talks about all the different uses of the EDA
09:47:11 18 tools that would be the DJ products.

09:47:13 19 And, in fact, Bell Semi admits that these EDA
09:47:18 20 tools have substantial non-infringing uses, so there cannot
09:47:21 21 be a basis for subject matter jurisdiction for contributory
09:47:24 22 infringement, Your Honor.

09:47:25 23 For inducement, the DJ Plaintiffs have to show
09:47:36 24 that there was an affirmative act encouraging others to
09:47:41 25 infringe. And what that comes down to in *DataTern* is --

09:47:43 1 THE COURT: Can I just stop you there?

09:47:44 2 MR. KAMPRATH: Yes, Your Honor.

09:47:45 3 THE COURT: They have to show that there's a
09:47:47 4 reasonable apprehension that they're going to be subject to
09:47:50 5 induced infringement allegations?

09:47:51 6 MR. KAMPRATH: Correct, Your Honor.

09:47:52 7 THE COURT: Okay.

09:47:53 8 MR. KAMPRATH: And the way that we figure out
09:47:54 9 whether there is reasonable apprehension is we go to the
09:47:57 10 statute, which is 271(b). Unfortunately, 271(b) does not
09:48:02 11 provide a ton of guidance.

09:48:03 12 But *DataTern* does, and it talks about how to
09:48:07 13 prove induced infringement. The patentee must show that the
09:48:10 14 accused inducer took an affirmative act to encourage
09:48:14 15 infringement with the knowledge that the induced acts
09:48:16 16 constitute patent infringement.

09:48:17 17 And here, as we've been discussing and as Your
09:48:20 18 Honor has been intimating, in *DataTern* there were charts
09:48:23 19 that cited to Microsoft user guides and manuals.

09:48:27 20 We have the same thing here. There are multiple
09:48:30 21 charts that were attached to the multiple underlying
09:48:33 22 lawsuits that show how the use -- that cite to user guides
09:48:38 23 and manuals for specific DJ Plaintiffs of EDA tools, how
09:48:44 24 those could be used by the underlying accused infringers to
09:48:48 25 practice the methods of the accused or the asserted patents.

09:48:52 1 That's the only evidence they have of a basis
09:48:58 2 for subject matter jurisdiction for inducement are those
09:49:02 3 charts. The problem is *DataTern* says that -- the *DataTern*
09:49:07 4 case looks at -- looked at those charts and then said,
09:49:14 5 "Considering these instructions," so looking at the charts
09:49:17 6 and all of the citations in those charts in those cases to
09:49:21 7 the Microsoft user guides and manuals, it said, "Considering
09:49:25 8 these instructions in view of the rest of the evidence on
09:49:28 9 record," then it found that there was a reasonable
09:49:31 10 apprehension of a suit for indirect infringement.

09:49:34 11 THE COURT: And you don't have that here?

09:49:36 12 MR. KAMPRATH: Correct, Your Honor. The only
09:49:37 13 thing we have are these charts. And I would submit to you,
09:49:40 14 Your Honor --

09:49:40 15 THE COURT: And you're saying you're basing
09:49:42 16 it -- it's the rest of the evidence on the record that
09:49:45 17 existed in *DataTern*?

09:49:46 18 MR. KAMPRATH: Correct. There's at least those
09:49:48 19 two things, Your Honor. And we don't have any pleading in
09:49:50 20 this case in the DJ Plaintiffs' Complaint of anything else
09:49:53 21 that's happened, other than those charts that are attached
09:49:57 22 to the underlying Complaints.

09:50:02 23 Bell Semi has not had any overt acts against the
09:50:05 24 DJ Plaintiffs. And, in fact, Your Honor, now looking in the
09:50:08 25 context of the litigation as we've spoken, the first cases,

09:50:12 1 underlying cases, as we've discussed, were filed in April of
09:50:15 2 2022. DJ Plaintiffs waited seven months to file this DJ
09:50:19 3 case or these DJ cases.

09:50:22 4 So, saying that there's a reasonable
09:50:24 5 apprehension of an actual litigation being filed, it seems
09:50:29 6 like if that was true, they would have filed these DJ cases
09:50:32 7 closer to the first filed underlying cases, which, again,
09:50:35 8 goes back to the efficiency. They could have intervened or
09:50:39 9 joined in those first filed cases, and they chose not to for
09:50:42 10 whatever reason.

09:50:43 11 THE COURT: I don't know. In *Mitek* the Court
09:50:44 12 said that there just had to be allegations by the patentee,
09:50:47 13 or other record evidence to establish at least a reasonable
09:50:50 14 potential that infringement claims against *Mitek* could be
09:50:54 15 brought. It's a reasonable potential, and that's a case
09:50:58 16 from last year.

09:50:59 17 MR. KAMPRATH: And, Your Honor, I would submit
09:51:01 18 if they had filed this case in April of last year, that
09:51:04 19 might have been correct. But waiting seven months, and
09:51:07 20 Bell Semi has yet to file any lawsuit against Cadence,
09:51:12 21 Siemens, or Synopsys. If there was a reasonable
09:51:14 22 apprehension, there is no reasonable apprehension now.

09:51:20 23 THE COURT: Because you haven't sued them yet?

09:51:22 24 MR. KAMPRATH: Correct, Your Honor.

09:51:23 25 THE COURT: I mean, that seems to me to be

09:51:25 1 contradicted by *Mitek*. I mean, if you look at the timeline
09:51:28 2 in *Mitek*, there were a lot more months between the initial
09:51:35 3 filings and when Judge Gilstrap made his decision which was
09:51:39 4 reversed.

09:51:40 5 MR. KAMPRATH: Correct, Your Honor.

09:51:40 6 THE COURT: That's a hard -- I don't get that.
09:51:43 7 But anyway, let's not dwell on that.

09:51:45 8 MR. KAMPRATH: Well, it's also just the whole
09:51:47 9 entire context, Your Honor. And as we talked, there were
09:51:50 10 90 cases filed, as well, and so that's different from *Mitek*.

09:51:53 11 But in this case, because there was this
09:51:55 12 campaign and it was moving on --

09:51:57 13 THE COURT: Well, so do you want to just state
09:52:00 14 in open court here that you will not sue them?

09:52:01 15 MR. KAMPRATH: I can't state that for my --

09:52:02 16 THE COURT: Well, that would take care of it,
09:52:04 17 wouldn't it?

09:52:09 18 MR. KAMPRATH: It could, but I can't state that
09:52:11 19 for my client, Your Honor.

09:52:16 20 The last basis would be direct infringement.
09:52:20 21 And the problem here is the same as the problem with the
09:52:24 22 indirect inducement claim, Your Honor. The only basis they
09:52:27 23 have for a direct infringement claim would be the claim
09:52:31 24 charts that were provided as part of the underlying
09:52:34 25 lawsuits.

09:52:35 1 THE COURT: Well, it's also -- you do have
09:52:36 2 allegations in the Complaints themselves --

09:52:39 3 MR. KAMPRATH: Correct, Your Honor.

09:52:40 4 THE COURT: -- that say it, so it's not just the
09:52:42 5 claim charts.

09:52:42 6 MR. KAMPRATH: Right. The claim chart --

09:52:43 7 THE COURT: In fact, what's noticeable about the
09:52:46 8 underlying Complaints is really the only fact alleged in the
09:52:49 9 Complaints about infringement is that the accused infringers
09:52:57 10 use the software manufactured by one of the Plaintiffs.

09:53:02 11 MR. KAMPRATH: Your Honor, that's the allegation
09:53:05 12 of how the method claim limitations are met, but there are
09:53:08 13 other allegations about how the method claims are -- how the
09:53:11 14 patent -- how the patented features are used. And so, it
09:53:15 15 goes back to -- and there are a ton of allegations in there
09:53:18 16 about who, what, when, where, why, how these are being
09:53:21 17 practiced.

09:53:41 18 Your Honor, I just heard from my client and we
09:53:44 19 can state in open court that if these cases are dismissed,
09:53:48 20 Bell Semiconductor will not sue the DJ patent -- DJ
09:53:52 21 Plaintiffs on these claims that are brought here.

09:53:57 22 THE COURT: All right. Does that change the
09:54:00 23 calculus for anyone sitting at the table?

09:54:04 24 MR. WOLF: Your Honor, no, because the whole
09:54:05 25 point of this is indemnity.

09:54:07 1 THE COURT: Right. You could have done a nicer
09:54:10 2 job, though, of articulating that, couldn't you have?

09:54:11 3 MR. WOLF: Your Honor, I'm not -- yes, Your
09:54:13 4 Honor, we could have.

09:54:13 5 THE COURT: All right.

09:54:14 6 MR. WOLF: Yes.

09:54:14 7 THE COURT: Go ahead.

09:54:16 8 MR. KAMPRATH: Your Honor, excuse me. Unless
09:54:18 9 you have any other questions, that's all I have, Your Honor.

09:54:20 10 THE COURT: Let me throw something at you and
09:54:27 11 get your reaction.

09:54:28 12 MR. KAMPRATH: Of course.

09:54:29 13 THE COURT: I think a better way of resolving
09:54:36 14 this preliminary injunction issue without hearing -- you
09:54:41 15 know, I've got to hear arguments from the parties, but a
09:54:43 16 thought --

09:54:43 17 MR. KAMPRATH: Of course.

09:54:44 18 THE COURT: -- really occurs to me. It's not
09:54:46 19 addressed until, I think, the last paragraph in your reply
09:54:48 20 brief. But it occurred to me before I read the reply brief,
09:54:52 21 which is that what we ought to do to create judicial
09:54:57 22 efficiency across the country is fast-track this case and
09:55:04 23 litigate validity.

09:55:10 24 And I'm going to guess all the other district
09:55:13 25 courts would say, You know what, let's step down. Let's

09:55:17 1 create judicial efficiency for the court system as a whole
09:55:21 2 and get that litigated. I think that's what Judge Kronstadt
09:55:25 3 was saying.

09:55:26 4 And so, what I'm also thinking, though, is,
09:55:34 5 well, why don't we do that, but at the same time engage in
09:55:38 6 expedited personal jurisdiction discovery. And so, I don't
09:55:43 7 decide your motion definitively until that's done.

09:55:48 8 What do you think about that?

09:55:50 9 MR. KAMPRATH: So, excuse me, Your Honor. A
09:55:52 10 couple just issues with that.

09:55:54 11 Number one is, I think, Judge Huff, who's been
09:55:56 12 litigating her cases for a year now, may have an issue with
09:55:59 13 that. And she may say that she should be the one to
09:56:03 14 litigate those issues as she's already been looking at these
09:56:05 15 things for a year.

09:56:06 16 THE COURT: Well, do you have a trial date in
09:56:09 17 that case?

09:56:09 18 MR. KAMPRATH: We do.

09:56:10 19 THE COURT: When is it?

09:56:11 20 MR. KAMPRATH: I'll hold that for you, Your
09:56:14 21 Honor, but as I stated earlier, those cases against *NXP*, the
09:56:17 22 claim construction briefing will be done next month. So,
09:56:19 23 it's in the middle of discovery, and claim construction is
09:56:22 24 almost finished.

09:56:23 25 The other thing I'd say, Your Honor, is there's

09:56:27 1 efficiency looking forward and then there are all the
09:56:29 2 efficiencies or inefficiencies that have happened going
09:56:33 3 backwards. And staying all of these other litigations so
09:56:36 4 that the validity could be decided is one way to look at
09:56:39 5 efficiency.

09:56:40 6 THE COURT: Well, actually in fairness -- sorry
09:56:42 7 to interrupt, but I should have said we can also have
09:56:45 8 non-infringement. I mean, you know, because that's what --
09:56:47 9 again, Judge Kronstadt is thinking, you know, you're right
09:56:51 10 that infringement by one of the customer defendants doesn't
09:56:59 11 do anything to resolve infringement or not necessarily
09:57:03 12 infringement by another. But it seems very clear that if
09:57:06 13 there's a finding of non-infringement in this case, that has
09:57:11 14 enormous judicial efficiency repercussions.

09:57:15 15 MR. KAMPRATH: I think that's correct, Your
09:57:17 16 Honor. And one thing I'll tell you, the Judge Huff *NXP*
09:57:21 17 case, the trial date is February 6th, 2024.

09:57:25 18 And here's the problem, Your Honor. In that one
09:57:30 19 scenario, that might be more efficient, but the problem is
09:57:32 20 if it's -- if these patents are found to be valid and
09:57:36 21 infringed by the DJ Plaintiffs, for example, we still would
09:57:39 22 then have to go and try every single other one of those
09:57:42 23 underlying cases because, number one, none of the underlying
09:57:46 24 accused infringers have agreed to be bound by factual
09:57:49 25 findings in this case.

09:57:50 1 And, number two, as we discussed, all the actual
09:57:54 2 evidence about how any of the accused infringer circuits are
09:57:58 3 made using these tools, Cadence, Siemens and Synopsys don't
09:58:01 4 have that evidence, Your Honor.

09:58:02 5 And so, there is a potential outcome where it
09:58:06 6 may be more efficient to do it that way, but that, we
09:58:09 7 submit, is not the most efficient way to try all these
09:58:12 8 issues that are at issue.

09:58:14 9 THE COURT: Yeah, I disagree with you there.
09:58:17 10 There's no question it would be most efficient to have one
09:58:21 11 Court address the validity and non-infringement of the
09:58:26 12 software manufactured by these three plaintiffs.

09:58:30 13 MR. KAMPRATH: And, Your Honor --

09:58:30 14 THE COURT: I just disagree with you.

09:58:32 15 MR. KAMPRATH: -- the other point I would make
09:58:33 16 is there is a mechanism for that. If that was going to
09:58:38 17 occur, the MDL, and, you know, DJ Plaintiffs could have and
09:58:42 18 probably should have filed a multidistrict litigation
09:58:45 19 request to have all of these cases put together, and they
09:58:49 20 did not. So, again, I mean, this bleeds into or colors the
09:58:53 21 efficiency argument we're making.

09:58:55 22 THE COURT: All right. How come you didn't sue
09:58:56 23 the three Plaintiffs here?

09:58:58 24 MR. KAMPRATH: Your Honor, it goes to the people
09:59:03 25 that are actually using the products and, again, it goes

09:59:08 1 back to the actual evidence involved in collecting and
09:59:11 2 showing who's actually using the products. It also goes
09:59:14 3 into who you want to sue. And Plaintiffs have a right to
09:59:17 4 sue who they would like to between who's actually
09:59:19 5 infringing.

09:59:20 6 THE COURT: You have a right. It's America.
09:59:22 7 You have a right. But I don't think I'm going to get a
09:59:28 8 complete candid answer from you. I don't mean to --

09:59:28 9 MR. KAMPRATH: No.

09:59:31 10 THE COURT: -- impugn your integrity, but I'm
09:59:32 11 sure your client wouldn't allow it. It's notable that you
09:59:35 12 didn't sue the Plaintiffs in this action.

09:59:36 13 MR. KAMPRATH: Correct, Your Honor.

09:59:38 14 THE COURT: And there's advantages to obtaining
09:59:42 15 settlements by not suing the Plaintiffs directly in this
09:59:46 16 action, aren't there?

09:59:47 17 MR. KAMPRATH: Of course, Your Honor. And,
09:59:48 18 again, that goes to strategy and licensing strategy.

09:59:50 19 THE COURT: And there are burdens placed on the
09:59:52 20 Court system as a whole by you choosing to not sue these
09:59:58 21 Plaintiffs and go around the country and file almost a
10:00:02 22 hundred infringement cases; correct?

10:00:05 23 MR. KAMPRATH: I agree with you, Your Honor, and
10:00:06 24 I would submit that there's also burden on our client for
10:00:10 25 having patents and having all these entities infringe their

10:00:13 1 patents. So, I understand, and this is part of the
10:00:16 2 strategy -- and, again, if we could have filed one case and
10:00:19 3 put all of the accused infringers in one case, we would have
10:00:22 4 tried that, but there are statutes that prevent that. So, I
10:00:24 5 understand your point, but part of it is we're hamstrung on
10:00:27 6 what we can do and where we can file.

10:00:30 7 Also, under *TC Heartland* we can't have venue in
10:00:32 8 one place. So, again, MDL could have been an option if, you
10:00:37 9 know, DJ Plaintiffs wanted to go that route, but that was
10:00:39 10 not decided. Instead, they decided to file a subsequent,
10:00:42 11 what we would say, duplicative case here.

10:00:45 12 THE COURT: All right. Anything else?

10:00:47 13 MR. KAMPRATH: No, Your Honor.

10:00:47 14 THE COURT: All right. Thank you.

10:00:48 15 MR. KAMPRATH: Thank you very much.

10:01:00 16 MS. SCHWARTZ: Good morning, Your Honor. My
10:01:08 17 co-counsel will be addressing many of the points that were
10:01:11 18 touched upon about the various District Court litigations
10:01:14 19 that are going on in the context of the motion for
10:01:18 20 preliminary injunction, but I did want to touch briefly on
10:01:22 21 the *NXP* case in particular.

10:01:25 22 I am counsel for NXP in that case, along with
10:01:30 23 Cadence's counsel, Mr. Miller. So, we are providing a
10:01:35 24 defense for NXP. I'm very familiar with that case as a
10:01:39 25 result.

10:01:39 1 THE COURT: So, who's the "we are providing a
10:01:43 2 defense"?

10:01:43 3 MS. SCHWARTZ: At the moment, Cadence and
10:01:44 4 Synopsys.

10:01:44 5 THE COURT: Are paying for the defense of NXP?

10:01:47 6 MS. SCHWARTZ: They are providing counsel.

10:01:48 7 THE COURT: You have record evidence to that
10:01:50 8 effect?

10:01:51 9 MS. SCHWARTZ: I believe it comes up in the
10:01:53 10 context of the motion for preliminary injunction, yes.

10:01:56 11 THE COURT: Can you point me to the record
10:01:57 12 evidence?

10:01:58 13 MS. SCHWARTZ: I would be able to, but I don't
10:02:00 14 have it right on hand here. But I can find it if -- when I
10:02:03 15 sit back down for the preliminary injunction.

10:02:05 16 THE COURT: Well, you've got, I don't know how
10:02:07 17 many, people sitting at the table. I am assuming
10:02:09 18 somebody --

10:02:09 19 MS. SCHWARTZ: I think someone is looking now.
10:02:11 20 But, in particular, there were a couple of
10:02:13 21 misrepresentations about the *NXP* case.

10:02:16 22 So, first of all, it was not Judge Huff who
10:02:19 23 denied the customer-suit motion to stay in that case. It
10:02:22 24 was her predecessor on the case, Judge Bashant. In that
10:02:26 25 decision --

10:02:26 1 THE COURT: Well, in fairness, you said
10:02:28 2 misrepresentation. I mean, you said --

10:02:34 3 MS. SCHWARTZ: The --

10:02:34 4 THE COURT: Just be careful with your use of the
10:02:36 5 words. I thought Mr. Kamprath did a very nice job and
10:02:40 6 didn't come across to me like he was being misleading. I
10:02:44 7 think he had to rely on a number of people. That's what
10:02:46 8 happens when you have a person who sues people in 90
10:02:50 9 different District Courts. So, it's hard to keep track of
10:02:53 10 these things.

10:02:53 11 MS. SCHWARTZ: Point taken, Your Honor.
10:02:55 12 Apologies.

10:02:56 13 THE COURT: It's all right.

10:02:56 14 MS. SCHWARTZ: But Judge Bashant in her decision
10:02:59 15 denying the motion to stay on the customer-suit exception
10:03:01 16 relied, in large part, on Bell's representation that they
10:03:05 17 had a meritorious motion to dismiss in connection with this
10:03:09 18 case here, the cases brought by the DJ Plaintiffs. And so,
10:03:14 19 certainly this Court's ruling if -- to the extent Your Honor
10:03:18 20 would deny a motion to dismiss, I think it's quite possible
10:03:24 21 that we'd move to reconsider that motion to stay, to the
10:03:27 22 extent Your Honor doesn't grant the preliminary injunction
10:03:29 23 motion.

10:03:30 24 So, I don't -- I think there's a lot of these
10:03:33 25 pieces that are all interconnected and basically come back

10:03:37 1 to the motion to dismiss that's pending before us today.

10:03:41 2 So, I just wanted to raise that issue.

10:03:47 3 I believe Mr. Kamprath said that we were well
10:03:48 4 into discovery. The very first two depositions Bell took
10:03:54 5 this past week, they were each 20-minute depositions. So,
10:04:00 6 we're just getting underway with discovery in the NXP cases.
10:04:04 7 The case is certainly --

10:04:05 8 THE COURT: Who did they depose for 20 minutes?

10:04:08 9 MS. SCHWARTZ: Two different engineers at NXP.
10:04:10 10 They took two 30(b)(1) depositions.

10:04:20 11 So, going back to --

10:04:22 12 THE COURT: I just need a second.

10:04:46 13 Sorry. Go ahead.

10:04:47 14 MS. SCHWARTZ: Circling back to Your Honor's
10:04:50 15 question about record evidence of the counsel being provided
10:04:54 16 by Cadence and Synopsys, those are DI-53 and DI-54 where we
10:05:00 17 have declarations from Mr. Miller and from my partner,
10:05:05 18 Barrington Dyer, as to the cases at the time of these
10:05:11 19 declarations as to which Defendants were being -- in which
10:05:15 20 cases. The suppliers were providing counsel for the
10:05:19 21 individual customers.

10:05:20 22 THE COURT: All right. Just hold on one second.

10:05:29 23 All right. Can you point where in DI-53?

10:05:32 24 MS. SCHWARTZ: So, DI-53, Paragraph 2 mentions
10:05:37 25 that Cadence agreed to defend certain of its customers, and

10:05:41 1 because of that Arnold & Porter lists off cases A through K
10:05:47 2 in which Cadence is providing representation for NXP,
10:05:54 3 Sequans, and Socionext, both in District Court and in ITC
10:05:58 4 proceedings.

10:06:00 5 And then Paragraph 3 includes additional counsel
10:06:04 6 where Cadence was providing counsel in cases that have since
10:06:09 7 been settled. That's L through T, those cases in
10:06:17 8 Paragraph 3 of DI-53.

10:06:20 9 THE COURT: Okay.

10:06:21 10 MS. SCHWARTZ: DI-54, similarly, Paragraph 2
10:06:26 11 lists the cases for which Synopsys is currently providing
10:06:32 12 defense in various *NXP* and *Socionext* cases.

10:06:36 13 THE COURT: All right. So, you've got Synopsys
10:06:40 14 and Cadence on the record providing defenses, paying for
10:06:45 15 defenses in cases, including NXP, and then were you also --
10:06:50 16 you're representing Siemens as well, right?

10:06:53 17 MS. SCHWARTZ: I'm representing Synopsys.

10:06:54 18 THE COURT: Well, are you speaking on behalf of
10:06:56 19 Siemens this morning?

10:06:57 20 MS. SCHWARTZ: I'm speaking on behalf of
10:06:59 21 Siemens, to the extent I can. If there are
10:07:00 22 additional factual --

10:07:00 23 THE COURT: Why don't you identify -- just put
10:07:02 24 on the record specific record evidence of defense or
10:07:08 25 indemnification obligations being paid for by Siemens.

10:07:13 1 MS. SCHWARTZ: I will let Mr. Cimino correct me
10:07:18 2 with any specifics, as he is counsel for Siemens there.

10:07:21 3 THE COURT: Let's put it on the record.

10:07:22 4 MR. CIMINO: Good morning, Your Honor. Frank
10:07:23 5 Cimino for Siemens.

10:07:23 6 We have not agreed to accept indemnity or defend
10:07:28 7 any of our customers yet. We have six of our customers that
10:07:32 8 are currently being sued. They have all requested that --
10:07:36 9 we have some pretty serious requests, and the company is
10:07:40 10 considering what to do. And, obviously, the outcome of this
10:07:42 11 case will help them decide. But so far, we are not
10:07:47 12 representing any of our customers.

10:07:51 13 THE COURT: So, you have not had to spend a
10:07:53 14 single penny yet, but there is record evidence, I do recall,
10:07:56 15 where there have been demands.

10:07:59 16 MR. CIMINO: We have demands from all of the
10:08:01 17 customers that are still in the active cases.

10:08:03 18 THE COURT: Oh, all of the customers?

10:08:05 19 MR. CIMINO: We have six customers in the active
10:08:07 20 cases.

10:08:08 21 THE COURT: And all of them have made demands
10:08:12 22 for indemnification or defense costs?

10:08:12 23 MR. CIMINO: Yes, Your Honor. We just have not
10:08:14 24 come to an agreement with them yet.

10:08:16 25 THE COURT: Got you.

10:08:16 1 MR. CIMINO: And we haven't spent a single penny
10:08:18 2 as counsel for those customers, but we have been assisting
10:08:21 3 them with their defenses and have filed this suit. So, we
10:08:24 4 have spent a penny.

10:08:25 5 THE COURT: Okay. Thank you.

10:08:27 6 MS. SCHWARTZ: But I expect that Mr. Wolf will
10:08:32 7 be able to address additional points in the context of the
10:08:35 8 preliminary injunction motion, but I wanted to put those
10:08:37 9 personal points on the record.

10:08:40 10 THE COURT: Okay.

10:08:41 11 MS. SCHWARTZ: In the context of the motion to
10:08:42 12 dismiss, I'd like to start with the *MedImmune* case because I
10:08:47 13 think this really sets the requisite standard, being the
10:08:51 14 Supreme Court decision. And so, the question is really
10:08:54 15 whether the facts here, whether the facts that are pled in
10:08:57 16 the Complaint provide a substantial controversy between Bell
10:09:04 17 and the three suppliers here, whether there is enough in the
10:09:08 18 Complaint to substantiate adverse legal interests between
10:09:12 19 them and us, where there is a reasonable apprehension here
10:09:15 20 of some potential impact on the suppliers.

10:09:18 21 And I think both the allegations in the
10:09:23 22 Complaint and the factual development that's taken place
10:09:25 23 after the filing of the motion to dismiss substantiate that
10:09:29 24 the suppliers do have significant risk here. There's
10:09:35 25 substantial controversy between Bell and the suppliers'

10:09:38 1 customers, which then necessarily implicates the suppliers.

10:09:42 2 And so, if we look at the different ways that
10:09:48 3 suppliers can establish standing, there's three possible
10:09:52 4 ways that we've kind of summarized here from --

10:09:55 5 THE COURT: Why don't you just get to *DataTern*,
10:09:57 6 right. Because I think you've got jurisdiction, but he
10:09:59 7 wants to -- you've got to address *DataTern*.

10:10:01 8 MS. SCHWARTZ: Okay. So, I'll skip over the
10:10:05 9 indemnity allegation and jump to --

10:10:06 10 THE COURT: Well, you've got record evidence,
10:10:08 11 first of all --

10:10:09 12 MS. SCHWARTZ: Yes.

10:10:10 13 THE COURT: -- that there have been either
10:10:12 14 demands or -- well, you've got record evidence that there
10:10:15 15 have been demands for defense or indemnification
10:10:20 16 reimbursement by underlying Defendants made to each of the
10:10:31 17 Plaintiffs in this case; right?

10:10:33 18 MS. SCHWARTZ: Correct.

10:10:33 19 THE COURT: Okay. So, we've got that on the
10:10:35 20 record.

10:10:35 21 MS. SCHWARTZ: Yes.

10:10:35 22 THE COURT: Okay.

10:10:36 23 MS. SCHWARTZ: Including there's a wealth of
10:10:38 24 that evidence in connection with the preliminary injunction
10:10:40 25 briefing.

10:10:41 1 THE COURT: Right. Okay.

10:10:42 2 MS. SCHWARTZ: And both -- all three suppliers
10:10:44 3 have produced all of their license agreements with the
10:10:47 4 customers that have been sued up to the point of the
10:10:51 5 briefing on the preliminary injunction motion. So, there's
10:10:55 6 ample evidence that's been produced to substantiate those.

10:11:01 7 So, if I skip to the controversy as to indirect
10:11:07 8 infringement, and I think this is really where *DataTern*
10:11:10 9 comes into play. So, *DataTern* did not involve questions of
10:11:16 10 indemnity issues.

10:11:18 11 The Plaintiffs there, Microsoft being one of
10:11:21 12 them, brought a declaratory judgment action. And in order
10:11:25 13 to try and establish subject matter jurisdiction was
10:11:29 14 pointing to the customer complaints and the claim -- the
10:11:34 15 infringement claim charts there as setting up an implied
10:11:39 16 indirect infringement case against Microsoft.

10:11:41 17 So, that was the general factual allegations
10:11:45 18 there. And if we look -- I think there's a reasonable
10:11:49 19 potential of a similar indirect infringement claim here.

10:11:52 20 And it's important to note that in *DataTern* the
10:11:54 21 Court did find that there was subject matter jurisdiction as
10:12:00 22 to at least part of Microsoft's claims. There was only one
10:12:06 23 patent where there just wasn't enough record evidence to
10:12:10 24 substantiate there was a reasonable apprehension of an
10:12:13 25 indirect infringement claim.

10:12:14 1 And so, the *Arris Group* confirms that you can
10:12:18 2 have an implicit assertion of indirect infringement when you
10:12:21 3 sue a customer of a supplier. And the *DataTern* case at the
10:12:27 4 bottom here is what kind of then sets the standard of what
10:12:30 5 do you do in order to determine whether there is this
10:12:33 6 implicit assertion of indirect infringement?

10:12:35 7 And all you need to have is a reasonable
10:12:38 8 potential, based on the record evidence, that such a claim
10:12:41 9 could be brought. That's on Page 905 of the *DataTern* case.

10:12:49 10 And so, here we have that reasonable potential.
10:12:51 11 I think basically if we boil down the *DataTern* case, there's
10:12:54 12 two points that it kind of looks at: Are the customers
10:12:58 13 accused of direct infringement based on use of supplier's
10:13:02 14 tools? We heard Mr. Kamprath answer, yes, that is the case
10:13:05 15 there. So, A is easily satisfied.

10:13:08 16 And so then the next question is: Do the
10:13:11 17 suppliers have the requisite mental state -- I'm sorry -- in
10:13:16 18 order to do either -- in order to do an indirect
10:13:22 19 infringement allegation? And here the documentation that's
10:13:26 20 in the record, and these are, you know, Exhibits 1
10:13:30 21 through 32, I believe, to the declarations in support of our
10:13:35 22 opposition to the motion to dismiss, are just a sampling of
10:13:39 23 many of the Bell allegations against the customers. And
10:13:42 24 they definitely demonstrate that they cite to the supplier's
10:13:46 25 documentation over and over again, you know, which gives the

10:13:51 1 implied accusation that the suppliers are instructing
10:13:55 2 customers on how to use the software and in an infringing
10:13:59 3 fashion, which is enough to give an implied indirect
10:14:02 4 infringement count.

10:14:02 5 THE COURT: All right. Give me an example of
10:14:04 6 one of those.

10:14:05 7 MS. SCHWARTZ: Sure. If we look at -- I think
10:14:06 8 Slide 26 is a nice one.

10:14:12 9 This is an example of a customer claim chart
10:14:16 10 taken from the -- one of the *Socionext* litigations, and you
10:14:21 11 can see in the background there is --

10:14:23 12 THE COURT: Is this case still pending?

10:14:25 13 MS. SCHWARTZ: Yes. It is, Your Honor.

10:14:26 14 THE COURT: Okay.

10:14:26 15 MS. SCHWARTZ: There are a number of
10:14:29 16 cut-and-paste excerpts from Cadence's documentation. And
10:14:33 17 then at the claim chart, it finishes up and says these same
10:14:37 18 steps are carried out by Synopsys, pointing to Synopsys user
10:14:42 19 guides; these same steps are carried out by Siemens,
10:14:45 20 pointing to a Siemens's user documentation.

10:14:49 21 So, this is just one of the examples. And this
10:14:51 22 is DI-39, Exhibit 2, at Page 12.

10:14:57 23 Exhibit 2 is -- the entire thing is a claim
10:14:58 24 chart -- extensive claim chart with extensive citations to
10:15:03 25 user documentation.

10:15:05 1 And we see this repeated over and over in the
10:15:07 2 customer litigation. So, we not only have these allegations
10:15:11 3 directly against the supplier's products, because the entire
10:15:16 4 basis for these claim charts are the supplier's
10:15:19 5 documentation, and then explicit recitation that these three
10:15:23 6 suppliers all instruct with their documentation pointing to
10:15:28 7 different documentation from Cadence, Siemens and Synopsys
10:15:32 8 to perform these steps.

10:15:34 9 And so, there's a wealth of record evidence
10:15:37 10 here. This is just a nice one so I can get all three
10:15:41 11 suppliers cleanly on one slide.

10:15:43 12 And so, I think given the evidence that's in the
10:15:48 13 record here, there's no doubt that Bell alleges that the
10:15:53 14 customer infringes based on use of the supplier tools, and
10:15:57 15 those allegations cite to and rely on suppliers'
10:16:01 16 documentation. It cites to documentation from all three
10:16:04 17 suppliers.

10:16:05 18 And so, I submit that Cadence, Siemens, and
10:16:10 19 Synopsys all satisfy the independent indirect infringement
10:16:15 20 basis to give grounds for DJ jurisdiction.

10:16:18 21 THE COURT: All right. Are you just going to
10:16:20 22 concede contributory infringement?

10:16:22 23 MS. SCHWARTZ: I'm going to contributory --

10:16:23 24 THE COURT: It's a good idea.

10:16:24 25 MS. SCHWARTZ: We didn't brief it, so... We

10:16:26 1 went with inducement as opposed to contributory.

10:16:29 2 THE COURT: All right.

10:16:30 3 MS. SCHWARTZ: And I think we also have the
10:16:32 4 third ground, which would be a controversy as to implied
10:16:37 5 direct infringement. And just based on these claim charts
10:16:41 6 alone, I think we have that. So, the *Microsoft versus*
10:16:45 7 *GeoTag* case from this district, because the Defendant --
10:16:50 8 Bell could have just as easily asserted a claim of direct
10:16:53 9 infringement against Siemens, Synopsys, and Cadence -- and,
10:16:56 10 again, we heard Mr. Kamprath admit as much -- based on the
10:17:00 11 exact same underlying circumstances.

10:17:02 12 THE COURT: Right. But, you know, let me play
10:17:05 13 devil's advocate here. How do you square that with
10:17:08 14 *DataTern*?

10:17:08 15 MS. SCHWARTZ: *DataTern* was not addressing the
10:17:10 16 direct infringement. It was -- it solely focused on the
10:17:12 17 indirect infringement case.

10:17:15 18 THE COURT: Well, you've got that sentence that
10:17:16 19 Mr. Kamprath recited here in court. And out of context at
10:17:22 20 least, that would appear to say it's not enough; right?

10:17:25 21 MS. SCHWARTZ: But that's ignoring the record
10:17:27 22 evidence. I think when you look at the record evidence --
10:17:31 23 so, I think that that sentence is important because then the
10:17:35 24 later case goes on to look at the record evidence.

10:17:38 25 And based on that *Microsoft DataTern* record

10:17:41 1 evidence, they found indirect infringement, at least for the
10:17:45 2 majority of patents for Microsoft.

10:17:48 3 THE COURT: My point is that what Judge Andrews
10:17:51 4 did is what, frankly, I would do, at least in the first
10:17:55 5 instance, and what I think is consistent with *Mitek*, which
10:17:58 6 is just to say if you're suing everybody for direct
10:18:00 7 infringement based on their use of the Plaintiffs here
10:18:05 8 product, that is a reasonable potential of alleged
10:18:09 9 infringement liability coming down the pike; right?

10:18:13 10 MS. SCHWARTZ: I would agree, Your Honor.
10:18:14 11 Especially in view of the claim charts and the expert
10:18:17 12 declarations that Bell attached to each and every one of its
10:18:20 13 customer Complaints that specifically and only point to the
10:18:24 14 suppliers's products, their documentation, and what they do.

10:18:27 15 THE COURT: Right.

10:18:28 16 MS. SCHWARTZ: And I think that's sufficient to
10:18:29 17 give subject matter jurisdiction under either indirect or
10:18:33 18 direct implied infringement.

10:18:35 19 THE COURT: Okay.

10:18:39 20 MS. SCHWARTZ: And so I don't have --

10:18:41 21 THE COURT: I just want to make sure that the
10:18:42 22 record is -- and I want to give Mr. Kamprath the opportunity
10:18:47 23 to respond and rebut this is not the case.

10:18:50 24 But my understanding is that there is record
10:18:59 25 evidence in the form of affidavits that establish that in a

10:19:09 1 case currently pending, one of the 28 cases, there has been
10:19:15 2 a demand for either defense cost reimbursement or
10:19:19 3 indemnification made on each of the three Plaintiffs; right?
10:19:26 4 That's what you're saying?

10:19:27 5 MS. SCHWARTZ: I can confirm that that is
10:19:29 6 absolutely the case for Synopsys and Cadence.

10:19:32 7 THE COURT: Well --

10:19:33 8 MS. SCHWARTZ: And I believe Mr. --

10:19:33 9 THE COURT: -- actually I think -- hold on.
10:19:36 10 Exhibit 2 of DI-39 at Page 12 -- sorry, different topic.
10:19:44 11 I'm confusing things.

10:19:45 12 Okay. You can confirm it. That's right.
10:19:48 13 You're confirming it for Cadence and for Synopsys.

10:19:51 14 MS. SCHWARTZ: Correct.

10:19:51 15 THE COURT: You can confirm it.

10:19:53 16 Do you disagree with that, Mr. Kamprath?

10:19:56 17 MR. KAMPRATH: No, Your Honor.

10:19:57 18 THE COURT: All right. Then for Siemens, is
10:20:00 19 the -- we just had representation of counsel.

10:20:03 20 Do we have any record evidence in the form of an
10:20:06 21 affidavit that there has been a defense or indemnity request
10:20:17 22 made on Siemens in a currently pending action?

10:20:22 23 MR. CIMINO: Yes, Your Honor. The declaration
10:20:24 24 of Tom Evans, Document 17.

10:21:01 25 THE COURT: Yeah. Can somebody hand that up? I

10:21:03 1 am -- for some reason, I do not have DI-17.

10:21:10 2 MR. CIMINO: I can hand you my copy, Your Honor.

10:21:22 3 THE COURT: Do you have it? Okay. DI-17 in
10:21:30 4 which case?

10:21:30 5 MR. CIMINO: In the *Siemens* case. So, the --

10:21:34 6 THE COURT: So, the DI-17 I have is titled
10:21:37 7 "Siemens Industry Software's Motion For Preliminary
10:21:39 8 Injunction."

10:21:40 9 MR. CIMINO: Right. 17-3.

10:21:41 10 THE COURT: Okay.

10:21:43 11 MR. CIMINO: Sorry about that, Your Honor.

10:21:44 12 THE COURT: That's all right.

10:21:46 13 MR. CIMINO: It's an exhibit.

10:21:47 14 THE COURT: I need 17-3.

10:22:25 15 MR. CIMINO: Paragraph 6 and 8, Your Honor.

10:22:31 16 THE COURT: Okay. But -- and you can confirm
10:22:47 17 that the Defendants, at least one of the Defendants
10:22:55 18 identified in Paragraph 6 of DI-17-3, which is the affidavit
10:23:00 19 or the declaration, rather, of Thomas Evans is currently a
10:23:05 20 Defendant in a pending action; is that right?

10:23:07 21 MR. CIMINO: Yes, Your Honor, for example, *NXP*.

10:23:11 22 THE COURT: Oh, okay. It is one of the
10:23:13 23 Defendants. All right.

10:23:14 24 MR. CIMINO: And we've produced the license in
10:23:17 25 connection with the PI, and we produced the correspondence

10:23:21 1 relative to the demands.

10:23:22 2 THE COURT: Okay. I just want to get clarity
10:23:25 3 that that's been identified.

10:23:26 4 Okay. Mr. Kamprath, do you contest that?

10:23:28 5 MR. KAMPRATH: I don't contest that, Your Honor,
10:23:30 6 but we do have a response to that.

10:23:32 7 THE COURT: You might, but I just want to get as
10:23:34 8 a factual matter --

10:23:35 9 MR. KAMPRATH: No, sir. No, Your Honor.

10:23:36 10 THE COURT: All right. Thank you.

10:23:37 11 All right. Go ahead.

10:23:39 12 MS. SCHWARTZ: I have nothing further, Your
10:23:40 13 Honor, not on the motion to dismiss.

10:23:42 14 THE COURT: Okay. All right.

10:23:46 15 Mr. Kamprath.

10:23:47 16 MR. KAMPRATH: Very briefly, Your Honor. On the
10:23:56 17 indemnity point, Your Honor, again, we can look at *DataTern*,
10:24:01 18 and I know we've looked at this case a lot and --

10:24:03 19 THE COURT: If I were you, I'd be looking at it
10:24:05 20 a lot, too. It's your best case.

10:24:07 21 MR. KAMPRATH: We have. So, Page 904, again,
10:24:09 22 what we just heard is there are requests for indemnity
10:24:15 23 and/or defense to the DJ Plaintiffs. *DataTern* is, once
10:24:19 24 again, if you look at Page 904, the paragraph that starts,
10:24:23 25 "To the extent that appellees argue." And if you go down to

10:24:31 1 the sentence that said, "Instead, appellees seek to broaden
10:24:38 2 our precedent quite substantially by arguing that a customer
10:24:42 3 request to indemnify ought to give rise to standing without
10:24:46 4 regard, it appears, to the merit of the customer request."

10:24:49 5 And here's where I take issue, Your Honor. We
10:24:53 6 see in the pleading, we've heard there's evidence of request
10:24:56 7 for indemnification. The DJ Plaintiffs have admitted they
10:25:00 8 have not accepted any of those obligations. There is no
10:25:04 9 DJ -- there is no --

10:25:05 10 THE COURT: No, no, no. Well, Siemens has
10:25:09 11 admitted.

10:25:09 12 MR. KAMPRATH: Not an indemnity obligation.

10:25:11 13 THE COURT: Oh, indemnity. I thought you were
10:25:12 14 talking about --

10:25:12 15 MR. KAMPRATH: There may be defense obligations,
10:25:15 16 but that's not what *DataTern* says. The basis in *DataTern*
10:25:17 17 and the other Federal Circuit case law is an indemnity
10:25:20 18 obligation and, in fact -- and my colleague, Mr. Newcomer,
10:25:23 19 will discuss some of this -- in the evidence that's been
10:25:25 20 brought forth in the record, the same declarants that
10:25:29 21 provided the evidence that they just pointed to and was sent
10:25:31 22 to Your Honor were deposed in this case, and they've
10:25:34 23 admitted there are no indemnity obligations that have been
10:25:34 24 accepted.

10:25:38 25 So, we've heard DJ Plaintiffs admit. We've

10:25:41 1 heard all the declarants also say that none of the indemnity
10:25:45 2 obligations have been accepted.

10:25:47 3 Why is that important? Why does that matter?
10:25:49 4 We're talking about whether there is subject matter
10:25:51 5 jurisdiction to have this case go forward. There is no
10:25:54 6 basis for that based on the actual facts that have come out
10:25:57 7 in this case.

10:25:59 8 THE COURT: Okay.

10:26:00 9 MR. KAMPRATH: The biggest issue I'll point
10:26:02 10 to --

10:26:04 11 THE COURT: Go ahead.

10:26:05 12 MR. KAMPRATH: -- Your Honor, and I think this
10:26:08 13 is now putting the horse before the cart, Bell Semi has
10:26:14 14 admitted if the Court dismisses this case, Bell Semi would
10:26:17 15 not bring these claims that are in DJ Plaintiffs' Complaint
10:26:21 16 against the DJ Plaintiffs. If there's any apprehension of a
10:26:24 17 lawsuit or if there was, I think that goes away with that
10:26:26 18 statement today.

10:26:27 19 THE COURT: You know, it's not made under oath.
10:26:29 20 I'm not sure that does dispense with it. It may at some
10:26:33 21 point.

10:26:34 22 MR. KAMPRATH: Well, Your Honor, we submit we
10:26:35 23 can follow up with the DJ Plaintiffs' counsel.

10:26:38 24 THE COURT: No, the problem is -- quite frankly,
10:26:41 25 even if we're under oath, the problem is it doesn't address

10:26:43 1 the defense and indemnity obligations. It does address them
10:26:49 2 being sued directly. I agree.

10:26:51 3 MR. KAMPRATH: Your Honor -- and I would then
10:26:53 4 submit we'd look at what *DataTern* says in the next sentences
10:26:57 5 here, and it says, "Thus, we decline appellees' request to
10:27:01 6 hold that their customers' indemnification requests, which
10:27:04 7 they concede are not valid alone, can create standing --

10:27:07 8 THE COURT: Wait. They've not conceded the
10:27:10 9 requests are not valid, have they?

10:27:12 10 MR. KAMPRATH: No, Your Honor.

10:27:12 11 THE COURT: Okay. Well, there's a big
10:27:14 12 difference.

10:27:14 13 MR. KAMPRATH: Of course. And I think the point
10:27:15 14 is -- and this is what *DataTern* gets into, and I would ask
10:27:19 15 that you look at Page 904.

10:27:21 16 THE COURT: I am.

10:27:22 17 MR. KAMPRATH: What *DataTern* discusses at the
10:27:25 18 bottom of Page 904 is that if there are defense or indemnity
10:27:30 19 obligations and if that's the sole basis for subject matter
10:27:33 20 jurisdiction, what they could have and should have done is
10:27:36 21 defend or indemnify the underlying cases, not filed a DJ
10:27:39 22 case.

10:27:40 23 And so, if the only remaining thing that's
10:27:41 24 creating subject matter jurisdiction is indemnity
10:27:45 25 obligations -- and as we just pointed out, there are

10:27:48 1 questions around that, in our opinion -- they could have and
10:27:50 2 should have indemnified or defended the underlying cases
10:27:54 3 which they've admitted they're not indemnifying as of yet
10:27:58 4 and they are defending some of those. That's *DataTern*,
10:28:02 5 Page 904, Your Honor.

10:28:02 6 THE COURT: All right.

10:28:04 7 MR. KAMPRATH: Unless you have anything else,
10:28:05 8 Your Honor, that's all I have.

10:28:06 9 THE COURT: No, that's fine. Thank you.

10:28:11 10 All right. Let's give the court reporter a
10:28:13 11 break, and we'll come back at 20 of.

10:28:19 12 MR. WOLF: And, Your Honor, just for
10:28:20 13 housekeeping purposes, how long would you like the
10:28:22 14 preliminary injunction discussion to go?

10:28:23 15 THE COURT: I didn't have anything particular in
10:28:27 16 mind. I think you should think about what I mentioned to
10:28:34 17 your friend across the aisle there and maybe think about
10:28:40 18 what's a reasonable calendar. So, I think that would be
10:28:48 19 wise.

10:28:48 20 MR. WOLF: Very good, Your Honor. Understood.

10:28:50 21 THE CLERK: All rise.

10:32:40 22 (Recess was taken.)

10:44:26 23 DEPUTY CLERK: All rise.

10:44:33 24 THE COURT: All right. Please be seated.

10:44:37 25 Okay. Before we get to the injunction, so I'm

going to deny the motion to dismiss. I believe that under *MedImmune* -- and I think the case that's most applicable is *Mitek* -- that declaratory judgment jurisdiction exists and Article III jurisdiction, I think, exists. I think those cases make clear that there has to be a reasonable apprehension of potential claims being brought or potential liability, and it exists here in two forms.

It exists first because there is record evidence that is adduced that the -- each of the Plaintiffs has been the subject of a request for reimbursement of defense costs or indemnification by one of the underlying Defendants in the underlying cases in a pending currently open case, one of the 28 cases that's identified by the Defendant.

Secondly, I think it's reasonable to apprehend based on the entirety of the litigation strategy employed by the Defendant, and based on the claim charts and the specific allegations in the Complaints in some of the pending cases -- or not just some of them, all of the pending cases that there is a reasonable potential that the Defendants could be subject to infringement claims.

Now, I acknowledge -- and I want to just address that specifically, not just direct infringement, but induced infringement. And I rely on that conclusion based on DI-39, Exhibit 2 at Page 12 where there's reference to the Plaintiffs' user guides.

10:46:59 1 And, now, I recognize that we have had it stated
10:47:05 2 in open court that the Defendant is not going to sue the
10:47:11 3 Plaintiffs. That's late -- you know, just occurred here.
10:47:21 4 It wasn't filed under oath. But I do concede if there had
10:47:28 5 been that declaration made under oath, that would cut
10:47:41 6 against, if not, nullify the second basis of the ruling.
10:47:47 7 But what it does not do is address the first basis of the
10:47:52 8 ruling which is sufficient under *Arris*, I think, and under
10:47:58 9 *Mitek* to give rise to the Article III jurisdiction.

10:48:03 10 There is some language admittedly in *DataTern*.
10:48:08 11 It's a little unusual opinion, *DataTern*. There's only two
10:48:12 12 judges, not a complete panel of the Court. I think the
10:48:15 13 language that Mr. Kamprath relied on, particularly the
10:48:20 14 hypothetical at the end, is dicta very clearly in my mind.
10:48:25 15 And I think the sentence at the beginning of Page 904 on
10:48:28 16 which he relied most extensively relating to direct
10:48:31 17 infringement relates solely to direct infringement and
10:48:34 18 basically posits the situation where you've got solely
10:48:39 19 allegations of direct infringement against customers and
10:48:43 20 that's it.

10:48:44 21 And the Court is saying that's not enough to
10:48:47 22 trigger or to justify a Plaintiff in a DJ action saying that
10:48:56 23 I think that I'm potentially subject to infringement. You
10:49:00 24 need more. That's what that one sentence says.

10:49:09 25 And so, that's my ruling on the jurisdiction.

10:49:12 1 I'm going to deny the motion to dismiss.

10:49:14 2 All right. So, now we have the preliminary
10:49:16 3 injunction, and I'm going to deny those motions, plural, to
10:49:19 4 dismiss in both cases. All right.

10:49:21 5 MR. WOLF: Thank you, Your Honor. Matthew Wolf.

10:49:24 6 THE COURT: And I did want to say, look, because
10:49:27 7 I do think there was a point raised by Mr. Kamprath that
10:49:35 8 subject matter jurisdiction has to exist throughout the
10:49:38 9 course of the case, and it may be that some of the
10:49:42 10 underlying cases are resolved and such that there may be
10:49:48 11 basis to question again whether personal jurisdiction or
10:49:52 12 really subject matter jurisdiction -- when I say "personal,"
10:49:54 13 I mean Article III or personal jurisdiction exist. And so
10:49:58 14 I'm denying it without prejudice to raise if facts arise
10:50:03 15 that all of a sudden make it the case that I no longer have
10:50:10 16 subject matter jurisdiction.

10:50:11 17 All right? Okay.

10:50:12 18 Thank you. Let's go with the preliminary
10:50:14 19 injunction.

10:50:14 20 MR. WOLF: Thank you, Your Honor, and I'm
10:50:15 21 prepared to discuss your question at any point, but --

10:50:19 22 THE COURT: Why don't you discuss it first
10:50:20 23 because, you know -- yeah, why don't you discuss it first.

10:50:26 24 MR. WOLF: Your Honor, Plaintiffs are amenable
10:50:28 25 to and, indeed, appreciative of Your Honor's proposition.

10:50:33 1 We would be prepared to go to trial in toto by January, in
10:50:39 2 January. We would note that there are deep 101 issues here,
10:50:45 3 and so there would be reason to do a preliminary motions
10:50:49 4 practice before we committed to all of the bells and
10:50:52 5 whistles of a preparation for a jury trial. We could file
10:50:55 6 that next week, the 101 motions. We could be ready to argue
10:50:59 7 those at Your Honor's convenience, but we would be ready to
10:51:04 8 do everything January 2024.

10:51:08 9 THE COURT: All right. Have you filed any 101
10:51:11 10 motions in any of the pending 28 cases?

10:51:13 11 MR. WOLF: We have, Your Honor. Many of them
10:51:14 12 are still -- some of them are still being resolved. One
10:51:17 13 judge denied it pending a Markman hearing.

10:51:21 14 Now, subsequently, Bell didn't identify what
10:51:25 15 terms they wanted construed. They argued it was premature
10:51:27 16 to analyze 101. So, in candor to Your Honor, they may take
10:51:30 17 the position that 101 should be only addressed
10:51:34 18 contemporaneous with subject to a Markman hearing.

10:51:37 19 If that's Your Honor's preference, we would be
10:51:40 20 happy to do that. We'd be happy to do that promptly.

10:51:44 21 THE COURT: How many patents -- there are six
10:51:46 22 asserted patents here; correct?

10:51:47 23 MR. WOLF: Yes, Your Honor.

10:51:48 24 THE COURT: How many of those are in the NXP
10:51:51 25 case?

10:51:51 1 MR. WOLF: All of them.

10:51:52 2 THE COURT: All six. Are there any other
10:51:55 3 patents in the *NXP* case not asserted here?

10:51:58 4 MR. WOLF: I believe it's six for all, and all
10:52:00 5 for six.

10:52:00 6 THE COURT: Across the board?

10:52:01 7 MR. WOLF: I believe that's right. Each.

10:52:05 8 MS. SCHWARTZ: The most recently filed case
10:52:06 9 against Texas Instruments, I believe, only asserts five
10:52:09 10 cases. That was filed within the last month, I believe.

10:52:13 11 THE COURT: All right. And the case that's
10:52:14 12 furthest along is the *NXP* case?

10:52:16 13 MR. WOLF: Right.

10:52:17 14 THE COURT: And the Markman hearing is scheduled
10:52:19 15 for when?

10:52:20 16 MR. WOLF: I'm turning to my colleague,
10:52:22 17 Mr. Miller.

10:52:22 18 MR. MILLER: June 12th, Your Honor.

10:52:24 19 THE COURT: How many terms?

10:52:26 20 MR. MILLER: I believe right now there are nine.

10:52:29 21 THE COURT: And the trial is scheduled for
10:52:39 22 February?

10:52:39 23 MR. MILLER: February.

10:52:40 24 MR. WOLF: 22nd.

10:52:42 25 THE COURT: Next year.

10:52:43 1 MR. WOLF: Yes. So, we would be happy to have
10:52:44 2 this trial in advance of that and, of course, alert the
10:52:48 3 judge in that case immediately if that were to be the
10:52:52 4 situation.

10:52:52 5 THE COURT: What's the next furthest along case?

10:52:57 6 MR. WOLF: There really isn't one. There are no
10:52:59 7 other -- Your Honor, let me -- we've prepared a chart and
10:53:02 8 I'm jumping ahead a little bit.

10:53:07 9 Here's the status of each of the cases. And
10:53:13 10 what you see is none of them, other than *NXP*, have a trial
10:53:19 11 date. Most of them are still in the initial pleading phase
10:53:23 12 or not even yet to the initial pleading phase.

10:53:44 13 THE COURT: It's Judge Huff who's handling the
10:53:52 14 *NXP* case.

10:53:53 15 MR. MILLER: That's correct, Your Honor.

10:53:54 16 THE COURT: I'm thinking maybe I should speak
10:54:07 17 with Judge Huff.

10:54:09 18 MR. WOLF: That might make sense, Your Honor.

10:54:11 19 THE COURT: What do you think?

10:54:13 20 MR. NEWCOMER: Your Honor, obviously, that's at
10:54:15 21 your discretion. We think it would be an error to just, you
10:54:19 22 know, superman her current case based, you know, on issues.

10:54:22 23 THE COURT: To "superman"?

10:54:23 24 MR. NEWCOMER: Excuse me. To grant an
10:54:25 25 injunction against Bell participating in her cases, without

10:54:29 1 considerations of comity which --

10:54:31 2 THE COURT: Well, wait. This is all -- this
10:54:32 3 talk is about there being no PI entertained by me.

10:54:37 4 MR. NEWCOMER: Right.

10:54:38 5 THE COURT: This would be me coordinating with
10:54:39 6 Judge Huff.

10:54:40 7 MR. NEWCOMER: Yeah. Right.

10:54:41 8 THE COURT: So, you don't object to that?

10:54:42 9 MR. NEWCOMER: No, of course not, Your Honor.

10:54:44 10 THE COURT: Yeah.

10:54:51 11 MR. WOLF: And we would suspect, Your Honor,
10:54:53 12 assuming --

10:54:53 13 THE COURT: Has she had any hearings on the
10:54:56 14 case?

10:54:56 15 MS. SCHWARTZ: She has not. Her predecessor had
10:55:01 16 a hearing.

10:55:02 17 THE COURT: But she's not spent time on the case
10:55:04 18 that you know of?

10:55:05 19 MS. SCHWARTZ: Other than -- I think we've had
10:55:07 20 three or four discovery letter briefs. That's it.

10:55:11 21 THE COURT: I'm sure she enjoyed that.

10:55:36 22 Not that I don't have enough work, but it just
10:55:39 23 strikes me as so inefficient to have these cases being
10:55:43 24 litigated across the country. What I'm inclined to suggest
10:55:48 25 and hear counsel is that I call Judge Huff and I say, you

10:55:54 1 know, I'll take on a trial next January, February on these
10:56:00 2 patents, the DJ action for invalidity and non-infringement.
10:56:05 3 Because you guys are prepared to do that already, so no one
10:56:09 4 is prejudiced. You're getting ready for trial any way.

10:56:14 5 But I don't -- and then get her reaction. I
10:56:16 6 mean, she may say, you know, I really want to do this patent
10:56:19 7 case. I'm well into it. And then -- I mean, I do not want
10:56:24 8 to interfere. I mean, that's part of the reason why I was
10:56:27 9 saying you should rethink your preliminary injunction. I
10:56:29 10 don't like the idea of making orders that effectively tell
10:56:34 11 another judge what to do, right.

10:56:39 12 Now, let me step back. What about the ITC?
10:56:41 13 What's being litigated in the ITC that's going to be decided
10:56:45 14 in August?

10:56:46 15 MR. WOLF: That's going to be the -- essentially
10:56:50 16 it's going to be the subset of the patents against NXP.
10:56:56 17 And, again, I'll turn to make sure that I don't overstate.

10:56:59 18 One of the two we're not involved in, the other
10:57:02 19 one, NXP, both sets of counsel are involved in and that's
10:57:06 20 set for hearing now in August.

10:57:07 21 THE COURT: And is that going to address
10:57:09 22 everything? It's going to address everything?

10:57:11 23 MR. NEWCOMER: I believe it only addresses a
10:57:14 24 subset of the patents, Your Honor.

10:57:14 25 THE COURT: No, sorry. But for those patents,

10:57:17 1 does it address everything, validity as well as
10:57:20 2 infringement?

10:57:20 3 MR. NEWCOMER: Absolutely, Your Honor. And, you
10:57:23 4 know, in talking to counsel, certainly Bell Semi would --
10:57:28 5 even though it's not binding on District Courts, if there's
10:57:31 6 a finding of invalidity in the ITC after that hearing, Bell
10:57:34 7 will agree to be bound by that to -- you know, because Bell
10:57:37 8 is interested in efficiency here as well.

10:57:39 9 THE COURT: Yeah. And I'm not interested -- I'm
10:57:40 10 not going to stop the ITC.

10:57:42 11 MR. NEWCOMER: Right.

10:57:43 12 THE COURT: It's too far along.

10:57:43 13 MR. NEWCOMER: Right.

10:57:44 14 THE COURT: And just respect for separation of
10:57:46 15 powers and different branches of Government, and I've
10:57:48 16 expressed these similar things in the *Koninklijke* case,
10:57:52 17 which you all cited from the transcript.

10:57:55 18 MR. WOLF: I would note two things, Your Honor,
10:57:57 19 and if given the opportunity I'd like, you know, five
10:57:59 20 minutes to try to change your mind, recognizing that I
10:58:01 21 likely won't on the ITC issue.

10:58:04 22 But the final decision from the ITC is not -- in
10:58:08 23 either of the investigations would not be until March.
10:58:11 24 Given the way the ITC typically handles things, if Your
10:58:14 25 Honor were to find, say, by 101 motion in -- and I'm just

10:58:19 1 picking a month randomly here -- in October that these
10:58:22 2 patents were invalid under 101 or a jury would have found --
10:58:26 3 find them non-infringed or invalid in January, typically the
10:58:30 4 ITC shows a great interest in what happens in a prior
10:58:37 5 District Court opinion.

10:58:38 6 THE COURT: Right. But if I'm going to give you
10:58:40 7 a trial date in January, or February at the latest, of next
10:58:47 8 year, I don't think -- I think we should just -- you should
10:58:53 9 count on that's when you'll get a resolution. I don't think
10:58:56 10 it's -- I don't intend it in -- under that expedited
10:59:00 11 schedule, I would not be saying, Let's deal with 101 the
10:59:02 12 next month or two.

10:59:03 13 MR. WOLF: Okay. I hear you, Your Honor.
10:59:05 14 Either way, though, that would be prior to the March 24th
10:59:08 15 final decision.

10:59:08 16 THE COURT: The ITC can do what it wants, but I
10:59:12 17 think I'm going to respect the ITC's powers and let it do
10:59:16 18 what it wants.

10:59:22 19 What do you think of this proposal?

10:59:26 20 MR. NEWCOMER: You know, Your Honor, obviously,
10:59:27 21 we request time to talk to our client about it specifically.
10:59:30 22 It may make sense for the parties to talk about a proposal
10:59:33 23 we can both agree to together. I certainly think your
10:59:35 24 inclination to not issue an Order that effectively binds
10:59:38 25 another judge is a good one and, obviously, part of our

10:59:41 1 presentation was going to be about that comment. So, I
10:59:44 2 think that's wise.

10:59:45 3 THE COURT: Right. So, where are you from?

10:59:47 4 MR. NEWCOMER: Texas. Houston.

10:59:49 5 MR. WOLF: Washington, D.C.

10:59:50 6 THE COURT: Are you in town for the rest of the
10:59:56 7 afternoon?

10:59:57 8 MR. NEWCOMER: Yes, Your Honor.

10:59:58 9 THE COURT: Mr. Kamprath, where are you from?

11:00:00 10 MR. KAMPRATH: Dallas, Your Honor.

11:00:01 11 THE COURT: Oh, we have a lot of Texans here. I
11:00:03 12 just spent the past week in Big Bend National Park. It's
11:00:07 13 beautiful. My son was married in Austin last Saturday.

11:00:12 14 MR. NEWCOMER: Thank you.

11:00:13 15 THE COURT: It's a neat place to be.

11:00:24 16 Okay. You sound like you think this would be a
11:00:26 17 good course of action.

11:00:27 18 MR. WOLF: Yes, Your Honor.

11:00:47 19 MR. NEWCOMER: And, Your Honor, just because you
11:00:49 20 prompted on this afternoon, you know, considering the
11:00:52 21 proposal is new, we may need a couple hours to talk to our
11:00:55 22 clients.

11:00:55 23 THE COURT: Oh, no. I have another hearing this
11:00:58 24 afternoon, so I was going to look at my calendar and try to
11:01:02 25 make a suggestion.

11:01:03 1 Again, are you all getting flights out of here?

11:01:05 2 That's why -- yeah, what time is your flight?

11:01:07 3 MR. NEWCOMER: 6:00 p.m.

11:01:08 4 THE COURT: Oh, okay. Yeah, we can do -- well,

11:01:11 5 actually, is that not going to give you enough time?

11:01:14 6 MR. NEWCOMER: Yeah, that's our concern, getting

11:01:16 7 ahold of our client and saying --

11:01:17 8 THE COURT: I thought your client was right

11:01:18 9 here.

11:01:19 10 MR. NEWCOMER: Well, they need to get ahold of

11:01:20 11 their clients, too, Your Honor.

11:01:25 12 We need to consult with other people within

11:01:28 13 the --

11:01:28 14 THE COURT: Oh.

11:01:30 15 MR. NEWCOMER: Okay. I just heard that a few

11:01:31 16 hours is fine, Your Honor.

11:01:33 17 THE COURT: The Markman is scheduled for

11:02:05 18 June 12th?

11:02:07 19 MR. WOLF: Yes, Your Honor.

11:02:08 20 MR. MILLER: Correct, Your Honor.

11:02:09 21 THE COURT: How long do you think the trial will

11:02:55 22 be?

11:02:56 23 MR. WOLF: We could do a week? A week, Your

11:03:00 24 Honor.

11:03:00 25 THE COURT: How about you guys? How long do you

11:03:02 1 think a trial will be? A week; right?

11:03:06 2 MR. KAMPRATH: Your Honor, that's hard to
11:03:07 3 estimate, but it's on the six patents. I'd estimate that
11:03:12 4 it's longer than a week.

11:03:13 5 THE COURT: Well, how much time did Judge Huff
11:03:15 6 give you?

11:03:15 7 MR. KAMPRATH: For each one of those cases?
11:03:18 8 We'd have to look. I don't think we have --

11:03:19 9 THE COURT: Oh, so, wait. I didn't realize that
11:03:22 10 she's --

11:03:23 11 MR. NEWCOMER: The cases were consolidated in
11:03:25 12 front of Judge Huff, but -- pretrial consolidation in front
11:03:29 13 of Judge Huff. The first case is scheduled for trial in
11:03:31 14 February of next year.

11:03:33 15 THE COURT: And how many days did they give you
11:03:35 16 for that?

11:03:35 17 MR. NEWCOMER: Let me check that, Your Honor.

11:03:37 18 MS. SCHWARTZ: She gave us a week on four
11:03:39 19 patents is my recollection, Your Honor.

11:03:42 20 THE COURT: And we have six.

11:03:43 21 MS. SCHWARTZ: Two of the patents are not -- are
11:03:45 22 currently stayed before Judge Huff.

11:03:47 23 THE COURT: Why?

11:03:48 24 MS. SCHWARTZ: Because of the ITC proceeding on
11:03:52 25 those two -- other two patents.

11:03:57 1 THE COURT: How many patents are at issue in the
11:03:58 2 ITC that is going to trial in August?

11:04:01 3 MS. SCHWARTZ: There are two different trials
11:04:03 4 going to the ITC. There's one patent in one of the ITC
11:04:06 5 actions, and there's two patents in the other ITC action.

11:04:09 6 So, three of the patents are not involved in the
11:04:12 7 ITC at all, and there's different -- different Defendants
11:04:16 8 are -- some are in one ITC action and not the other and vice
11:04:20 9 versa.

11:04:29 10 THE COURT: Did you want to say something?

11:04:31 11 Sorry. Did you want to say anything?

11:04:32 12 MR. NEWCOMER: Oh, no, Your Honor. Just on the
11:04:34 13 conferencing with opposing counsel to figure out how to
11:04:37 14 handle this.

11:04:37 15 THE COURT: Right. All right.

11:05:42 16 I'll get you a trial January 16th; 16th, 17th,
11:05:46 17 18th, 19th. I think we can do it in four days. If we
11:05:49 18 can't... But I'll get you a trial.

11:05:51 19 I'm only going to set you, nobody else. I won't
11:05:54 20 double book.

11:05:55 21 MR. WOLF: Thank you, Your Honor.

11:05:56 22 THE COURT: Now, so you go confer. I'll call
11:05:59 23 Judge Huff. You want to come back at one o'clock? Would
11:06:05 24 that give you enough time, you think?

11:06:07 25 MR. WOLF: Sure.

11:06:09 1 MR. NEWCOMER: Yes, Your Honor.

11:06:10 2 MR. WOLF: Yes, Your Honor.

11:06:10 3 THE COURT: All right. And then let me just
11:06:13 4 double-check and make sure I'm okay. Yes. One o'clock
11:06:39 5 works. We have to be out of here at two o'clock because
11:06:42 6 there's preparations being made for tomorrow's investiture
11:06:45 7 in court.

11:06:46 8 All right. So, how about I see you all at one
11:06:49 9 o'clock.

11:06:49 10 MR. ROSENZWEIG: Your Honor, it's not clear if
11:06:51 11 you need to see the Government at one o'clock.

11:06:52 12 THE COURT: No, you can go.

11:06:53 13 MR. ROSENZWEIG: Is there anything you want to
11:06:55 14 hear about the PI as it pertains to the ITC?

11:06:59 15 THE COURT: Did you have any thoughts?

11:06:59 16 MR. ROSENZWEIG: Well --

11:06:59 17 THE COURT: You can all sit.

11:07:02 18 MR. ROSENZWEIG: Sure. I'll keep this very
11:07:08 19 short. If Your Honor wants to fill in the denial of the PI
11:07:11 20 as against the ITC with an oral ruling late, well --

11:07:14 21 THE COURT: Well, wait. There was never a PI
11:07:17 22 against the ITC.

11:07:19 23 MR. ROSENZWEIG: A PI against -- the parties
11:07:21 24 participating at the ITC. Bell participating at the ITC.

11:07:23 25 THE COURT: I'm not going to grant that.

11:07:25 1 MR. ROSENZWEIG: If you're not going to grant
11:07:27 2 it, there are three reasons for not granting it.

11:07:29 3 One is the first to file ruling doesn't apply.

11:07:31 4 Second is --

11:07:31 5 THE COURT: Why are you asking -- why did you
11:07:34 6 have to go through the merits of it?

11:07:36 7 MR. ROSENZWEIG: Well, I was just going to
11:07:37 8 recite it if Your Honor wanted to address it in more detail.

11:07:41 9 THE COURT: I don't, because they're going to
11:07:42 10 withdraw it.

11:07:43 11 Right? Aren't you? You're going to withdraw
11:07:45 12 your PI?

11:07:45 13 MR. WOLF: Your Honor, in light of your comment,
11:07:47 14 it would be foolish not to.

11:07:49 15 MR. ROSENZWEIG: Well, that takes care of it.
11:07:50 16 Thank you.

11:07:50 17 THE COURT: Thank you. Okay. Anything else?

11:07:54 18 All right. I'll see you all at 1:00. Thanks.

11:07:56 19 DEPUTY CLERK: All rise.

11:10:27 20 (Recess was taken.)

01:00:04 21 DEPUTY CLERK: All rise.

01:00:09 22 THE COURT: All right. Please be seated.

01:00:12 23 So, I did not successfully reach Judge Huff. I
01:00:17 24 left a message with her and with the courtroom deputy. I
01:00:22 25 Googled her.

01:00:22 1 I guess she's well known for her interest in IP
01:00:25 2 law. Did you all know that? Probably, of course, you would
01:00:28 3 know that. You've researched your judge, I'm sure.

01:00:35 4 So, where are you all? Let's hear from you
01:00:38 5 folks.

01:00:38 6 MR. WOLF: We had positive conversations under
01:00:41 7 the -- we have -- if Your Honor decides that the
01:00:46 8 January 16th date is where we're going, which is, of course,
01:00:48 9 our preference, we have no doubt we'll be able to come up
01:00:52 10 with interim dates and an interim proposal. The one wild
01:00:57 11 card in that scenario which has yet to be resolved is the
01:00:59 12 Markman hearing, how you want to handle --

01:01:01 13 THE COURT: Well, I've got an idea about that.

01:01:03 14 MR. WOLF: Yes.

01:01:03 15 THE COURT: And it may, in fact -- if you want a
01:01:05 16 January 16th date, will you agree to be bound by Judge
01:01:10 17 Huff's rulings in the claim construction hearing on
01:01:13 18 June 12th?

01:01:13 19 MR. WOLF: Yes, Your Honor. The one thing I
01:01:15 20 want to note, it doesn't -- it's not a caveat, but what I'm
01:01:18 21 saying is she's only going to be construing four of the six
01:01:21 22 patents that you would. So, there would still be a need
01:01:23 23 for or at least a potential need for a Markman hearing here,
01:01:26 24 although it would be on a subset of the total potential
01:01:30 25 claims.

01:01:30 1 THE COURT: Right. What do you think? Do you
01:01:33 2 think that could be bound by her rulings?

01:01:37 3 MR. NEWCOMER: There's an interesting dynamic
01:01:40 4 there that I haven't thought about, Your Honor.

01:01:40 5 THE COURT: If you want to talk to your counsel
01:01:42 6 for a couple minutes, you know, why don't we do that.

01:01:44 7 MR. NEWCOMER: I think --

01:01:44 8 THE COURT: I'm trying to be fair to both sides.

01:01:46 9 MR. NEWCOMER: I think we would certainly be
01:01:49 10 fine with them being bound by her ruling, and we, obviously,
01:01:51 11 would because they're a party.

01:01:53 12 THE COURT: Yeah, you want to be bound.
01:01:54 13 Basically you both -- I mean, it's more important to -- it's
01:01:59 14 their request, so it's more important that they agree.

01:02:01 15 MR. NEWCOMER: Right.

01:02:02 16 THE COURT: But it seems to me everyone ought to
01:02:09 17 agree. We ought to do this. The whole idea behind what I'm
01:02:12 18 doing is to save the court's resources. We're overburdened.

01:02:17 19 MR. NEWCOMER: Absolutely, Your Honor, and I
01:02:18 20 think we are fully on board with agreeing to be bound. I
01:02:22 21 thought the question was whether they have to be bound by
01:02:24 22 that or not.

01:02:25 23 THE COURT: Well, I wouldn't agree to their
01:02:26 24 January date unless they agreed.

01:02:28 25 MR. WOLF: Yeah, Your Honor. As I said, we do.

01:02:30 1 And that's -- whatever the two of you decide, I just want to
01:02:35 2 flag, again, the fact that because it's four of six and
01:02:37 3 there's some interplay, there was an argument that it should
01:02:40 4 be all done -- all six should be done at once, and we defer
01:02:44 5 to you and Judge Huff in that discussion, however you think
01:02:46 6 that's best to be handled.

01:02:49 7 THE COURT: Right.

01:02:50 8 MR. WOLF: Best to handle.

01:02:51 9 THE COURT: Okay. So, it seems to me what we
01:02:58 10 ought to do is -- I'm going to say we're going to have trial
01:03:02 11 here. January 16th is the date I gave you?

01:03:04 12 MR. WOLF: Yes, Your Honor.

01:03:04 13 THE COURT: Four-day trial. And it will be on
01:03:07 14 the six asserted patents. If it goes over, we'll make --
01:03:11 15 we'll do what's necessary to have it go over. We -- and
01:03:19 16 then you work out a schedule. I think once I give you a
01:03:23 17 trial, then I think usually counsel have always been able to
01:03:26 18 come up with a schedule. I'm going to -- I guess, can you
01:03:28 19 do that here?

01:03:28 20 MR. WOLF: Yes, Your Honor. We'll be waiting to
01:03:30 21 hear from you about what's happening with Markman because if
01:03:32 22 you're going to end up with the hearing, we will need to
01:03:35 23 know when your hearing date is.

01:03:36 24 THE COURT: Right.

01:03:36 25 MR. WOLF: Whatever you tell us, we can work

01:03:38 1 off.

01:03:38 2 THE COURT: You should plan right now -- I mean,
01:03:40 3 you've got -- because June 12th is coming fast.

01:03:43 4 MR. WOLF: Right.

01:03:43 5 THE COURT: You should plan on your having
01:03:45 6 Markman then in front of her. And let's -- I'll see what
01:03:48 7 she says. She may say, "I haven't done any work. I'm not
01:03:51 8 interested. Please take the Markman."

01:03:52 9 She may say, "I'm already into it," and she may
01:03:56 10 say -- and, you know, the caveat of this whole thing is if
01:04:01 11 she comes -- if she says to me, "I wish you wouldn't have a
01:04:03 12 trial on January 16th, that affects me in a negative way."
01:04:08 13 If she persuades me that, I'll bring you back in. I think
01:04:10 14 I'm going to know that very, very soon.

01:04:12 15 I left a message for her. I mean, it's early.
01:04:14 16 I think she's going to get back to me pretty promptly is my
01:04:18 17 guess.

01:04:18 18 MR. WOLF: Because if that happens, then we're,
01:04:19 19 obviously, going to want our shot to argue for the
01:04:21 20 injunction under the customer exception, but we'll worry
01:04:23 21 about that, jump off that bridge when we get to it.

01:04:26 22 THE COURT: Correct. I think it would be worth
01:04:29 23 your while because I think this is going to be resolved
01:04:31 24 pretty quick. I would plan on engaging in discussions, and
01:04:34 25 I'm going to say you need to get me a Scheduling Order, a

01:04:37 1 proposed Scheduling Order with the January 16th trial date,
01:04:40 2 let's say, how about a week from Friday? Does that work?

01:04:44 3 MR. NEWCOMER: Yeah. We can, obviously -- it's
01:04:46 4 their request for that time. We have a couple issues we
01:04:50 5 wanted to just flag for the Court.

01:04:51 6 THE COURT: Yeah, go ahead.

01:04:52 7 MR. NEWCOMER: First, you know, within the
01:04:53 8 Scheduling Order -- and we'll work it out with them, but
01:04:56 9 we're going to be proposing an extension of the time to
01:05:00 10 answer on the DJ action here or respond to the claims.

01:05:04 11 In addition, we proposed, you know, in the
01:05:07 12 interest of getting these efficiencies you talked about, you
01:05:11 13 know, with the ITC case going forward, would they be
01:05:14 14 amenable to being bound by the outcome of that case in terms
01:05:18 15 of infringement and validity as that goes forward.

01:05:22 16 THE COURT: Well, they don't want to be in the
01:05:24 17 ITC, so how would they ever agree to that?

01:05:27 18 MR. NEWCOMER: Well, I'm just --

01:05:27 19 THE COURT: But, look, I know what you're
01:05:29 20 saying.

01:05:29 21 MR. NEWCOMER: It would be an efficiency, and
01:05:31 22 that's all we're suggesting. And, of course, they wouldn't
01:05:34 23 have to, and we haven't, you know, worked out an agreement
01:05:38 24 to that effect or anything.

01:05:39 25 THE COURT: Well, if they're willing to go with

01:05:41 1 that, I'm certainly not going to have a problem with that.
01:05:43 2 It would be efficient. I will tell you this is -- you know,
01:05:48 3 we won't have a ruling. That's a problem. We're not going
01:05:51 4 to have an ITC ruling by January; right?

01:05:54 5 MR. NEWCOMER: Right. But if we both agree to
01:05:56 6 be bound for those particular patents, then that clearly
01:05:59 7 helps with the number of patents that would have to be tried
01:06:01 8 here for the declaratory judgment claims. They have got --
01:06:04 9 because they've got in -- they've got the non-infringement
01:06:08 10 and the invalidity.

01:06:14 11 MR. WOLF: Your Honor, I think it's unlikely we
01:06:16 12 will agree, but we've agreed to talk with them with an open
01:06:18 13 mind. So, we'll just get back to you if anything does -- I
01:06:21 14 mean, we've been collaborative, and I have no doubt we'll
01:06:25 15 continue to be collaborative, but I think it's unlikely that
01:06:27 16 we're not going to want to avail ourselves of this Court for
01:06:31 17 those purposes, but we'll get back to you and we'll engage
01:06:33 18 with an open mind with opposing counsel.

01:06:35 19 THE COURT: Okay. Well, do that because I'm all
01:06:37 20 about efficiency.

01:06:38 21 MR. NEWCOMER: And to that end, one thing they
01:06:39 22 mentioned to us is about, you know, potential motions to
01:06:44 23 stay. They might have, in some of the other underlying
01:06:48 24 cases in your Court's decision, you know, to have trial in
01:06:52 25 January. And one area of efficient -- it just came to our

01:06:55 1 mind. We haven't had a chance to discuss it -- is if they
01:06:57 2 can work on getting their customers to agree to be bound
01:07:01 3 because that's what this really is about; right? And, you
01:07:05 4 know, we think that would create a significant amount of
01:07:09 5 efficiency if this goes forward in January.

01:07:11 6 THE COURT: Okay. So, the problem is I don't
01:07:13 7 know how to accomplish that. In other words, I don't think
01:07:17 8 I can force them to do that; right?

01:07:19 9 MR. KAMPRATH: But --

01:07:20 10 THE COURT: But I've also got to believe -- and
01:07:21 11 this is why I think it is -- the most efficient thing to do
01:07:25 12 here is if I'm a customer and there was an adverse ruling
01:07:34 13 here against either of the Plaintiffs, I think the customer
01:07:42 14 is probably not going to want to continue very much more in
01:07:45 15 litigation in another District Court. I mean, I think
01:07:48 16 that's the reality.

01:07:49 17 MR. NEWCOMER: That may be the reality, Your
01:07:51 18 Honor. Obviously, the jurisdictional ruling in Houston was
01:07:54 19 because of their defense and indemnity obligations, at least
01:07:57 20 in part. And, at least for some of the customers, they've
01:08:02 21 accepted defense where they can control, right, that case.

01:08:05 22 So, why can't those customers be bound and
01:08:09 23 when --

01:08:09 24 THE COURT: Right. The only thing I don't know
01:08:11 25 is whether there might be -- essentially what you want is

01:08:17 1 that there's something that distinguishes the practice of
01:08:23 2 the methods even though it's using the EDA -- is it ED --

01:08:30 3 MR. NEWCOMER: EDA tool. Yes, Your Honor. EDA
01:08:32 4 tool.

01:08:33 5 THE COURT: On a customer-by-customer basis.
01:08:35 6 You know, but --

01:08:36 7 MR. NEWCOMER: Yeah.

01:08:36 8 THE COURT: But, you know it's like the Venn
01:08:39 9 diagram, the intersection is in here in this court.

01:08:41 10 MR. NEWCOMER: Right.

01:08:42 11 THE COURT: It may be that in one of the circles
01:08:44 12 on the edges there's something about a customer that might
01:08:47 13 exempt it from infringement; right? So, because that's your
01:08:51 14 point and it was --

01:08:52 15 MR. NEWCOMER: Right.

01:08:53 16 THE COURT: -- recognized by Judge Kronstadt
01:08:54 17 that you're right. There could be a finding of infringement
01:08:59 18 here that's not going to dispose of an infringement claim
01:09:03 19 elsewhere.

01:09:04 20 MR. NEWCOMER: That's --

01:09:05 21 THE COURT: But a finding of non-infringement
01:09:07 22 here would dispose of the claims. And my sense is, Well,
01:09:11 23 that's the way I think he interpreted -- is it he or she?

01:09:14 24 MR. NEWCOMER: He.

01:09:15 25 THE COURT: Right.

01:09:16 1 MR. NEWCOMER: I would disagree with that just
01:09:18 2 on one front, which is, you know, my understanding is that,
01:09:20 3 at least in their reply brief, they talked about proving up
01:09:24 4 their claims related to their use on, like, using the EDA
01:09:29 5 tools sort of to test them out as a way that they might, you
01:09:34 6 know -- that infringement by --

01:09:35 7 THE COURT: Like a direct infringement claim?

01:09:36 8 MR. NEWCOMER: Yeah, like a direct infringement
01:09:38 9 claim.

01:09:38 10 And so, if they're proving up
01:09:41 11 infringement/non-infringement based on their use, that
01:09:44 12 wouldn't -- in year by the use of the customer in the same
01:09:48 13 way because there may be different uses.

01:09:50 14 THE COURT: Right. So -- well, I'll tell you
01:09:52 15 what, so -- and you can -- you just can get the transcript
01:09:55 16 at a later date.

01:09:56 17 If we got to the point in this case where that
01:09:59 18 became a real issue, that they are -- they being the
01:10:04 19 Plaintiffs -- are somehow reading the patents in a way that
01:10:10 20 would make the alleged direct infringement against them to
01:10:18 21 be different than any alleged direct infringement by a
01:10:22 22 customer, well, then, you need to come and talk to me
01:10:25 23 because then I am wasting my time.

01:10:26 24 MR. NEWCOMER: Right.

01:10:27 25 THE COURT: Okay. But I read the allegations in

01:10:30 1 all of your Complaints and the claim terms to suggest
01:10:34 2 otherwise.

01:10:34 3 MR. NEWCOMER: Yes.

01:10:35 4 THE COURT: Okay.

01:10:36 5 MR. NEWCOMER: This is just an issue of ordinary
01:10:38 6 use and that type of thing, Your Honor. And, obviously, you
01:10:41 7 know, we have separate -- you know, we've just been thinking
01:10:43 8 about this, but we have separate damages allegations against
01:10:45 9 them. And that's where the real value of the patents lies,
01:10:48 10 is in, you know, the method they apply to -- to design these
01:10:52 11 chips. So, that's just another issue we're thinking about.

01:10:55 12 THE COURT: Well, first of all, if you read my
01:10:57 13 form Order, I phase the cases. I don't get to damages until
01:11:02 14 we have a finding of infringement and no invalidity. And,
01:11:09 15 you know, if you -- I'm certainly willing to entertain -- I
01:11:13 16 normally do it in front of the same jury. That's the way I
01:11:16 17 think it should be done.

01:11:17 18 But, again, I'm just trying to gain efficiencies
01:11:21 19 here. I doubt that I could conceive of trying the damages
01:11:27 20 in a separate trial, but, you know, if you think that would
01:11:32 21 somehow be helpful, you can raise that with me. I think to
01:11:35 22 me, you're right, damage is going to be different.

01:11:42 23 There's going to be a lot more damages if you
01:11:45 24 were to prevail than you would against any one customer I've
01:11:47 25 got to believe; right?

01:11:49 1 MR. NEWCOMER: I don't know the answer to that
01:11:50 2 right now.

01:11:53 3 THE COURT: Okay. Fair.

01:11:53 4 MR. WOLF: So, Your Honor, we have a fair amount
01:11:55 5 to talk about in light of Your Honor's guidance, and we look
01:11:59 6 forward to hearing the results of your conversations with
01:12:02 7 Judge Huff. And we're prepared to proceed and get this done
01:12:05 8 expeditiously and efficiently.

01:12:08 9 THE COURT: Okay. Just so it's clear what's
01:12:10 10 left on the agenda, number one is by Friday next week you
01:12:15 11 need to submit a proposed Scheduling Order which has the
01:12:19 12 date. As soon as I hear from Judge Huff, I'll communicate
01:12:22 13 with the parties. If need be, we'll have a phone call.

01:12:26 14 MR. WOLF: Very good.

01:12:27 15 THE COURT: All right. Before I forget, second,
01:12:30 16 have you submitted your Corporate 7.1 disclosures to comply
01:12:35 17 with my Orders?

01:12:38 18 MR. WOLF: I believe so. Yes. Yes, Your Honor.

01:12:39 19 THE COURT: The supplement --

01:12:40 20 MR. WOLF: I know what you're talking about, and
01:12:42 21 I'm 99.9 percent sure we have.

01:12:44 22 THE COURT: Okay. And --

01:12:45 23 MR. WOLF: And we'll, obviously, confirm today
01:12:47 24 in case we haven't.

01:12:47 25 THE COURT: And be mindful that I have a

01:12:49 1 third-party litigation funding.

01:12:51 2 MR. WOLF: 100 percent, Your Honor. Yes.

01:12:52 3 THE COURT: I have looked at -- because I don't
01:12:56 4 remember seeing yours, but I did see your Disclosure Order.
01:12:58 5 It is not sufficient. You have to go -- and I think you
01:13:03 6 might have had language in yours that said you're tracking
01:13:06 7 down information.

01:13:08 8 MR. NEWCOMER: I believe that's correct,
01:13:10 9 Your Honor.

01:13:10 10 THE COURT: Yeah. You're presently doing -- and
01:13:12 11 that's fine, but you need to get that done. This is not an
01:13:15 12 academic exercise.

01:13:17 13 You can have a seat.

01:13:18 14 I had a case within the last six months, and
01:13:21 15 it's similar to your situation, okay, where you've got a
01:13:25 16 Trust, and you still have to identify who are the
01:13:27 17 beneficiaries of the Trust. I need to know who the people
01:13:30 18 are.

01:13:30 19 And I had a case within the last -- it's either
01:13:34 20 six or eight months where a friend of mine turned out to be
01:13:41 21 one of the beneficiaries of one of the many Trusts that were
01:13:45 22 part of an LLC that was filed here. It turns out it was a
01:13:50 23 blind Trust. He didn't know that there was a lawsuit. He
01:13:54 24 didn't know his Trust was part of the LLC and -- but I
01:14:02 25 discovered it.

01:14:02 1 And I do not want to be, in the future, facing
01:14:06 2 an allegation that I presided over a case where I ruled --
01:14:13 3 you know, where I should have been recused.

01:14:16 4 All right. So, this is not just an academic
01:14:19 5 exercise. It has real implications. And there's
01:14:22 6 certainly -- in this state right now, there's a lot of press
01:14:24 7 about judges hearing cases where parties are before them
01:14:28 8 that they had a relationship with.

01:14:30 9 And I don't want to have to defend that because
01:14:33 10 it's defending a negative. It's impossible to prove a
01:14:37 11 negative, right. And so, that's why -- one of the reasons
01:14:42 12 and a significant reason why I do this. Okay? So, that's
01:14:48 13 why we have to get to the individuals.

01:14:50 14 Now, fair that, you know, people can say, Well,
01:14:53 15 LLCs, why do we treat them differently than incorporated
01:14:57 16 entities or corporations? I get that. But the law does.
01:15:01 17 The Supreme Court does. All the circuits do. And all the
01:15:05 18 circuits, to my knowledge, do it when it comes to residency
01:15:09 19 that we go beneath the corporate entity in an LLC to the
01:15:14 20 individuals to determine citizenship. So, there is a
01:15:17 21 distinction. And so, that's -- so, please comport with that
01:15:17 22 Order.

01:15:26 23 And you think can you get it done in a week?

01:15:35 24 MR. KAMPRATH: Probably, Your Honor. We'll have
01:15:36 25 to confer with our client to make sure that's doable.

01:15:38 1 THE COURT: Okay. All right.

01:15:40 2 Anything else?

01:15:42 3 MR. WOLF: No, Your Honor. We appreciate your
01:15:43 4 time today. Thank you.

01:15:45 5 THE COURT: Anything else from you?

01:15:47 6 MR. NEWCOMER: No, Your Honor.

01:15:47 7 THE COURT: Okay. So, the only thing is the
01:15:49 8 status. So, the PI has been withdrawn without prejudice to
01:15:53 9 renew.

01:15:54 10 MR. WOLF: Thank you, Your Honor. Yes, Your
01:15:55 11 Honor.

01:15:55 12 THE COURT: Or you want me to just -- I'll tell
01:15:57 13 you what, I'll just deny it without prejudice to renew.
01:16:01 14 Okay? That's the fastest way to do it.

01:16:03 15 MR. WOLF: Very good.

01:16:04 16 THE COURT: We'll issue an oral Order that will
01:16:06 17 deny it without prejudice to renew for the reasons stated
01:16:09 18 during the hearing today. We've already issued an oral
01:16:11 19 order for motions to dismiss for the reasons articulated on
01:16:15 20 the record today.

01:16:16 21 Okay. That's it?

01:16:19 22 MR. NEWCOMER: Thank you, Your Honor.

01:16:20 23 THE COURT: Thank you very much. They were very
01:16:22 24 good arguments today.

01:16:35 25 THE CLERK: All rise.

01:16:38 1

(Court was recessed at 1:16 p.m.)

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I hereby certify the foregoing is a true and

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accurate transcript from my stenographic notes in the

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proceeding.

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/s/ Heather M. Triozzi

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Certified Merit and Real-Time Reporter

U.S. District Court

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